No. 92-479-CSX
Status: GRANTED

Title: TXO Production Corp., Petitioner
v.
Alliance Resources Corp., et al.

Docketed:
September 17, 1992

Court: Supreme Court of Appeals
of West Virginia

Counsel for petitioner: Phillips,Carter G.

Counsel for respondent: Watson,Wade T., Brumfield,G. Davis, Chesebro,Kenneth J.

Supreme Court of West Virginia den petn 6-24-92.

Entry	Date	Note	Proceedings and Orders
1	Sep 17 1992	G	Petition for writ of certiorari filed.
2	Oct 19 1992	G	Motion of American Petroleum Institute, et al. for leave to file a brief as amici curiae filed.
3	Oct 19 1992		LODGING consisting of four copies of one document submitted by amici American Petroleum Institute, et al.
4	Oct 19 1992	G	Motion of West Virginia Chamber of Commerce for leave to file a brief as amicus curiae filed.
6	Oct 19 1992		Brief of respondents Alliance Resources Corp., et al. in opposition filed.
5	Oct 21 1992		DISTRIBUTED. November 6, 1992
7	Oct 22 1992	X	Reply brief of petitioner filed.
8	Nov 9 1992		REDISTRIBUTED. November 13, 1992
9	Nov 16 1992		Motion of American Petroleum Institute, et al. for leave to file a brief as amici curiae GRANTED.
10	Nov 16 1992		Motion of West Virginia Chamber of Commerce for leave to file a brief as amicus curiae GRANTED.
12	Nov 19 1992		REDISTRIBUTED. November 25, 1992
13	Nov 30 1992		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
16	Dec 30 1992		Record filed.
		*	Certified proceedings Supreme Court of Appeals of West Virginia (Box)
15	Jan 5 1993		Order extending time to file brief of petitioner on the merits until January 22, 1993.
17	Jan 21 1993		Brief amicus curiae of Equal Employment Advisory Council filed.
18	Jan 22 1993		Brief amici curiae of Owens-Illinois, et al. filed.
19	Jan 22 1993		Brief amicus curiae of Washington Legal Foundation filed.
20	Jan 22 1993		Brief amici curiae of American Council of Life Insurance, et al. filed.
21	Jan 22 1993		Brief amicus curiae of Center for Claims Resolution filed.
22	Jan 22 1993		Brief amici curiae of American Tort Reform Association, et al. filed.
23	Jan 22 1993		Brief amicus curiae of Business Council of Alabama filed.
24	Jan 22 1993		Brief amici curiae of Arthur Andersen & Co., et al. filed.
25	Jan 22 1993		Brief amici curiae of Phillips Petroleum, et al. filed.
26	Jan 22 1993		Brief amicus curiae of Church of Scientology of California filed.

No. 92-479-CSX

Entry	Date	Note	Proceedings and Orders
27	Jan 22 1993		Brief amici curiae of American Automobile Manufacturers Assn., et al. filed.
28	Jan 22 1993		Brief amicus curiae of Securities Industries Assn., Inc. filed.
29	Jan 22 1993		Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
30	Jan 22 1993		Brief amicus curiae of Continental Casualty Company filed.
31	Jan 22 1993		Brief of petitioner TXO Productions Corp. filed.
32	Jan 22 1993		Brief amici curiae of CBS, Inc., et al. filed.
33	Jan 22 1993		Joint appendix filed.
35	Jan 28 1993		Order extending time to file brief of respondent on the merits until March 3, 1993.
37	Mar 2 1993		Brief amicus curiae of Trial Lawyers for Public Justice filed.
36	Mar 3 1993		SET FOR ARGUMENT WEDNESDAY, MARCH 31, 1993. (1ST CASE).
38	Mar 3 1993		Brief amicus curiae of National Assn.of Securities and Commercial Law Attorneys filed.
39	Mar 3 1993		Brief amicus curiae of Association of Trial Lawyers of America filed.
40	Mar 3 1993		Brief amicus curiae of Public Citizen filed.
41	Mar 3 1993		Brief amici curiae of Consumers Union of U.S., et al. filed.
42	Mar 3 1993		Brief amicus curiae of Center for Auto Safety filed.
45	Mar 3 1993		Brief amicus curiae of University Scholars and Law Professors filed.
46	Mar 3 1993		Brief amicus curiae of Alabama Trial Lawyers Association filed.
47	Mar 3 1993	X	Brief of respondents Alliance Resources Corp., et al. filed.
48	Mar 3 1993	X	Brief amici curiae of Attorneys General of the states of Alabama, et al. filed.
49	Mar 3 1993	X	Brief amicus curiae of West Virginia Trial Lawyers filed.
44	Mar 5 1993		CIRCULATED
50	Mar 12 1993	D	Application (A92-693) by Petitioner to file a reply brief in excess of page limits, submitted to The Chief Justice.
51	Mar 16 1993		(A92-693) Opposition to application filed by respondents, Alliance Resources Corp.
52	Mar 16 1993		Application (A92-693) denied by the Chief Justice.
54	Mar 23 1993	X	Reply brief of petitioner filed.
55	Mar 31 1993		ARGUED.

92-479
No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), violated TXO's procedural due process rights.

2. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

3. Whether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E. 2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner TXO Production Corp. has been merged into Marathon Oil Company.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that its parent company is USX Corp.

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IN THE

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OCTOBER TERM, 1992

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TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

TXO Production Corp. petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App., *infra*, 1a-52a) is not reported. The separately filed concurrence of McHugh, C.J., of the Supreme Court of Appeals of West Virginia (App., *infra*, 53a-54a), is not reported. The ruling of the Circuit Court of McDowell County, West Virginia, on petitioner's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, or, in the alternative, for remittitur, is not reported. The transcript of the proceeding on that motion is included in the Appendix (App., *infra*,

55a-74a) as is the court's written order. (App., *infra*, 75a-76a). The ruling of the Supreme Court of Appeals of West Virginia on the petition for rehearing (App., *infra*, 77a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on May 14, 1992. A petition for rehearing was denied on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

This case presents the quintessential example of punitive damages "run wild." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). The dispute began as a declaratory judgment action brought by petitioner TXO Production Corp. ("TXO") to interpret a mineral severance deed. It resulted ultimately in a jury award against TXO of $19,000 in compensatory damages and $10 million in punitive damages on defendants' counterclaim for slander of title. Although the punitive award was 526 times the compensatory award, and was rendered without the procedural safeguards that this Court found to be crucial in *Haslip*, and that the Supreme Court of Appeals of West Virginia itself had held to be mandated under *Haslip*, the judgment was affirmed on appeal.

1. In the summer of 1984, TXO became interested in leasing a tract of land in McDowell County, West Virginia, known as the "Blevins tract," for purposes of oil and gas exploration and production. App., *infra*, 7a-8a. The title holder, Tug Fork Land Company ("Tug Fork"),

had leased the oil and gas development rights. The lease had been assigned to Alliance Resources Corporation ("Alliance"). App., *infra*, 7a. In 1985, TXO and Alliance signed an agreement under which TXO would pay Alliance $20 per acre for its interest in the Blevins tract; Alliance would assign to TXO its full title and interest in the lease, reserving an overriding royalty interest; and Alliance would reimburse TXO the consideration paid for the lease if TXO determined through title examination that title had failed as to all or any part of the leased premises. App., *infra*, 8a-9a & n.1.

TXO thereafter retained a West Virginia law firm to perform a title examination prior to drilling a well. App., *infra*, 9a. TXO's attorneys found a problem with the title, opining that in a 1958 deed, Tug Fork had conveyed to one Leo J. Signaigo, Jr., the oil and gas rights to the Blevins tract, and that those rights were now held by Signaigo's successor in interest, Virginia Crews Coal Company ("Virginia Crews").[1] App., *infra*, 9a; Tr. 388-90; 409-12.[2]

TXO was unwilling to invest over $200,000 in drilling an oil and gas well on the property until it had cleared any potential cloud on the title. See App., *infra*, 12a. Accordingly, TXO obtained and recorded a quitclaim deed in which TXO was granted any rights that Virginia Crews might have to the property. App., *infra*, 11a.

Thereafter, TXO called a meeting with Alliance. The West Virginia Supreme Court characterized TXO's ac-

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[1] In reaching this conclusion, counsel relied upon the language in the 1958 deed to Signaigo, the non-assessment of any taxes on the mineral estate to Tug Fork and its successors, and importantly, the assessment and payment of taxes on the mineral estate by Virginia Crews and its predecessors in interest. *See* Rec. 1591, 1605, 1611-12 (Pl. Ex. 3).

[2] The record in the Supreme Court of Appeals of West Virginia is cited herein as "Rec." The trial transcript begins at page 2177 of that record. The page numbers of the trial transcript are referenced as "Tr. ——"; they are not otherwise paginated in the record.

tions at that meeting, taken together with TXO's failure to discuss the title problem with respondents prior to having recorded the quitclaim deed, as a bad-faith attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights." App., *infra*, 11a-12a.

2. Shortly after that meeting, on August 23, 1985, TXO filed its complaint in the Circuit Court of McDowell County, West Virginia, for declaratory judgment to quiet title. App., *infra*, 12a. Respondents counterclaimed, alleging the 1958 deed was unambiguous in reserving the entire oil and gas estate to Tug Fork and its assignees, and that the recording of the quitclaim deed on July 11, 1985, constituted a slander of their title to the Blevins tract.

The question whether there was in fact a defect in the chain of title was tried to the court in a bifurcated action. On December 17, 1987, without taking any evidence, the court ruled that title was vested in Tug Fork. App., *infra*, 12a; Rec. 691-722.

In June of 1990, the case on the counterclaim for slander of title went to trial before a jury. The jury found for respondents, and awarded $19,000 to compensate respondents for their attorney's fees incurred in defending the declaratory judgment action brought by TXO. App., *infra*, 12a, 20a. No award was made for any actual damage to respondents' property rights or to their ability to sell or lease the property. See App., *infra*, 20a. Although it found no actual property damage, the jury awarded $10 million in punitive damages against TXO, an amount approximately 526 times the compensatory award.[3]

[3] Over TXO's objections, respondents presented hearsay testimony of unrelated "other acts" of TXO. App., *infra*, 21a-24a. Four attorneys from Louisiana, Oklahoma, and Texas were permitted to give their opinions concerning TXO's conduct in cases filed in those states, wholly unrelated to the parties, facts, or underlying cause of action in the case at bar. App., *infra*, 21a-24a. The West Virginia Supreme Court approved the admission of this testimony under West Virginia's "catch-all" exception to the hearsay rule. App., *infra*, 30a-32a.

TXO moved for judgment notwithstanding the verdict or, in the alternative, for remittitur, based, *inter alia*, upon the excessiveness and disproportionality of the punitive award given the lack of harm to respondents, and the absence of meaningful standards for the jury and the trial court in determining the severity of the award. App., *infra*, 55a-69a. The court, without explanation, denied the post-trial motions from the bench. App., *infra*, 72a.

3. The West Virginia Supreme Court affirmed. First, it rejected TXO's argument that TXO had been denied due process because it was not afforded the procedural safeguards approved in this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, *supra*, 111 S. Ct. 1032, and applied by West Virginia Supreme Court in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) (on remand from the United States Supreme Court, 111 S. Ct. 2882 (1991)).[4] App., *infra*, 7a, 32a.

In *Garnes*, the West Virginia Supreme Court, "following the dictates of *Haslip*," set out a detailed procedure for awarding punitive damages in compliance with the requirements of due process. *Garnes*, 413 S.E.2d at 908. This procedure was designed to provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review." 413 S.E.2d at 908. Under this new system, the trial court is required, at a minimum, to explain five specific criteria to the jury for use in determining the appropriateness and size of a punitive award. App.,

[4] Both *Haslip* and *Garnes* were decided after TXO's motion for judgment *n.o.v.* had been ruled upon.

infra, 33a-34a (citing *Garnes*, 413 S.E.2d at 908-09). These same factors, plus four others, are to be taken into consideration by the trial court upon its review of the award. App., *infra*, 34a (citing *id.* at 909). Finally, the West Virginia Supreme Court's review of a punitive damages award must be based upon the same factors. *Garnes*, 413 S.E.2d at 910. In *Garnes*, the West Virginia Supreme Court reversed the judgment, and remanded the case for a new trial to be conducted under the requirements the court had articulated. *Id.* at 910-11.

The West Virginia Supreme Court, however, took a different course with respect to TXO. Although the court recognized that it had "set out [the *Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*," App., *infra*, 35a, it decided not to apply these guidelines retroactively to cases tried before the *Garnes* decision, thereby denying TXO these due process protections. App., *infra*, 32a.

Additionally, the court rejected TXO's claim that the $10 million award violated substantive due process because it was excessive and disproportionate to the amount of the compensatory award. See App., *infra*, 40a. Purporting to set out "broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages," App., *infra*, 35a, the court concluded:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

App., *infra*, 36a, 51a-52a. The court then explained that "[i]n cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the

outer limit of punitive damages is *roughly* five to one." App., *infra*, 38a (emphasis in original). By contrast, according to the court, "[w]hen the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant . . . . [In such cases] . . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*." App., *infra*, 39a. Based upon the "really mean"/"really stupid" test, the court concluded that the $10 million award against TXO was acceptable. App., *infra*, 40a.[5]

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Appeals of West Virginia in this case denied petitioner TXO the procedures approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), as satisfying the Fourteenth Amendment; it established a new test for appellate review of the size of a punitive award that is inherently arbitrary and thus itself violates due process; and it approved an award so grossly excessive and disproportionate to actual injury that it constitutes a denial of due process. The West Virgina Supreme Court's decision is in conflict with other state- and federal-court decisions rendered post-*Haslip*. This Court's review is therefore necessary to resolve those conflicts and to ensure that defendants in cases involving punitive damages are afforded the protections due under *Haslip*.

A separate compelling reason exists for the Court to review this case. The West Virginia Supreme Court de-

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[5] Chief Justice McHugh, joined by Justice Miller, wrote separately, criticizing the "ridiculous categorization" adopted by the majority to determine what level of punitive damages is permissible. Specifically, the Chief Justice denounced the majority's "use of such subjective and nontechnical terms as 'really mean' and 'really stupid' " as a "cavalier attempt to be clever and amusing." App., *infra*, 53a-54a.

clined to afford TXO the process that, in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, it had earlier held are mandated under *Haslip*, and that it had applied to the parties in that case. By refusing to apply its *Garnes* due process standards to this case, the West Virginia Supreme Court acted in a manner contrary to the principles of retroactivity law animating this Court's decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). This Court should grant review to decide whether, under *James Beam*, state courts must retroactively apply decisions interpreting federal law.

1. In *Haslip*, this Court emphasized that the *three layers* of safeguards provided by Alabama's scheme for imposing punitive damages were vital to its decision upholding the award of punitive damages in that case. 111 S. Ct. at 1046. Under Alabama's system, these safeguards were provided through the jury instructions, post-trial review conducted by the trial court on the record, applying specific criteria, and appellate review, also applying specific criteria. *Id.* at 1044-46. By contrast, TXO was denied "the full panoply of [such] procedural protections." *Id.* at 1046. The $10 million award was subjected to no "meaningful and adequate review by the trial court." *Id.* at 1044. Nor was TXO afforded the sort of appellate review this Court found essential to provide a "definite and meaningful constraint on the discretion of [the] fact finders." *Id.* at 1045. The West Virginia Supreme Court approved a $10 million award made without the procedural protections that are constitutionally required. It is unsurprising that this approval is in conflict with other courts' views of what due process requires under *Haslip*.[6]

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[6] What makes the holding particularly worthy of review by this Court is that the West Virginia Supreme Court is not the only court that has adopted a cavalier approach to *Haslip*. *See, infra*, notes 10 and 11.

a. Under the Alabama procedure approved in *Haslip*, "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so . . . . Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' . . . and 'other factors, such as the impact on innocent third parties.'" 111 S. Ct. at 1044 (citations omitted) (quoting *Hammond* v. *City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

Here, in stark contrast to the approved approach, the trial court summarily denied TXO's post-trial motions from the bench. App., *infra*, 74a. The absence of any post-verdict review on the record deprived TXO of its full due process rights. Yet, the West Virginia Supreme Court found no constitutional infirmity. App., *infra*, 7a.

In several recent cases, other trial courts' summary approvals of punitive damages awarded by juries have been held to violate due process under *Haslip*. In *American Employers Insurance Co.* v. *Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), for example, the jury had awarded $400,000 in compensatory damages and $750,000 in punitive damages against an insurance company on a bad-faith claim. The jury instruction was "substantially similar to the one in *Haslip*," 931 F.2d at 1464, but the trial court denied defendant's motions for judgment *n.o.v.* or, in the alternative, for a new trial and remittitur "without comment," *id.*, as the trial court did here. The Eleventh Circuit found that this summary denial did not meet the *Haslip* standards for post-trial review, and remanded for the trial court to set forth in the record its review of the factors approved in *Haslip*. *Id.*

Likewise, the Eighth Circuit has on two occasions expressed concern over the record's lack of a "meaningful and adequate review by the trial court" of punitive dam-

ages awards, *Haslip*, 111 S. Ct. at 1044, and has remanded those cases for such a review to be placed on the record. Thus, in *Cole* v. *Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991), the jury awarded $2 million in punitive damages, 13⅓ times more than the compensatory award of $150,000. In reviewing the defendant's due process challenge to the punitive award, the court's concern over "whether the district court . . . appropriately reviewed the punitive damage award" caused it to remand the case "so that the district court [might] conduct this review under the standards articulated in *Haslip*." 947 F.2d at 320.

And in *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), the plaintiff was awarded $750,000 in compensatory damages and $8 million in punitive damages. The court first found that the jury instructions were adequate under *Haslip*. *Id.* at 1347. Then the court observed that "*Haslip* also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards." *Id.* The court concluded that the punitive award had to be vacated because the district court, like the trial court here, had "denied summarily" the defense motion for remittitur. Accordingly, the court of appeals "remand[ed] for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip*." *Id.* See also *Medical Mut. Liab. Ins. Soc.* v. *B. Dixon Evander & Assocs.*, No. 1752, 1992 Md. App. LEXIS 144 (Md. Ct. Spec. App. July 13, 1992) (vacating punitive damages and remanding based in part on lower court's failure to record its findings as to the propriety of the award).

In each of these cases, the appellate court overturned an award of punitive damages and remanded for the trial court to provide defendants with the procedural protections mandated by the Due Process Clause, protections that had been eviscerated by the trial courts' summary consideration and rejection of the defendants' claims. In

this case, by contrast, the West Virginia Supreme Court affirmed the judgment and award of punitive damages even though the trial court had summarily rejected TXO's challenge to the punitive damages award without conducting any sort of analysis. The West Virginia trial court's summary approval of the $10 million punitive award is indistinguishable from the decisions of the other trial courts found inadequate by the Eleventh and Eighth Circuits. Review by this Court is clearly warranted to resolve the existing conflict among the lower courts concerning precisely what is required by *Haslip*.

b. Additionally, TXO was deprived of due process at the appellate level. The West Virginia Supreme Court addressed neither the jury instructions nor the nonexistent review by the trial court. Instead, turning its back on the appellate standards articulated in its *Garnes* decision, the West Virginia court formulated and applied a "really mean"/"really stupid" defendant test in lieu of the type of "detailed substantive standards" approved in *Haslip*.[7] 111 S. Ct. at 1045. Setting forth "broad, general guidelines" for future application, App., *infra*, 35a, the court held that the outer limit for punitive damages imposed on "really stupid" defendants is roughly set by a five-to-one ratio, whereas punitive damages imposed on "really mean" defendants are constitutional no matter what their relationship to the plaintiffs' actual injury. App., *infra*, 38a-39a.

This wholly arbitrary "test"[8] does not comport with due process. Rather, it invites trial and appellate courts

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[7] Also representative of the cursory "review" performed by the West Virginia Supreme Court is the court's statement that "because [TXO] and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur." App., *infra*, 7a.

[8] As the West Virginia Supreme Court itself admitted, it is "difficult to distinguish" between "really mean" and "really stupid" defendants subject to punitive damages awards. App., *infra*, 36a n.11. These inherently subjective categories clearly provide no legitimate basis for restricting damages to five times the compensa-

to evaluate subjectively a defendant's acts as either mean or stupid,[9] an endeavor utterly inconsistent with this Court's emphasis on meaningful safeguards to prevent excessive punitive damage awards. See *Haslip*, 111 S. Ct. at 1046 (under Alabama's punitive damages procedure, award "did not lack objective criteria"). This subjective and standardless review cannot be said to provide "an additional check on the jury's or trial court's discretion." *Id.* at 1045.

It is well established that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). No such legally fixed standards inhere in the newly minted "really mean"/"really stupid" defendant test. A defendant thus has no indication of what sort of behavior may arbitrarily be labeled as "really mean," a characterization that will unconstitutionally result in a punitive award that is virtually unlimited.

While the court in this case has adopted an extreme and indefensible interpretation of what *Haslip* permits and requires with respect to excessiveness of punitive awards, the problem of deciding what *Haslip* means is widespread among the lower courts, both state and federal. The results in scores of cases purporting to apply *Haslip* are deeply troubling. The excessive punitive damages awards that alarmed this Court, see *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 280-81, 282 (1989) (Brennan, J., joined by Marshall, J., concurring) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (Brennan, J., joined by Marshall, J., and Stevens, J., dissenting), continue virtually unabated.[10] It is disconcerting that many lower courts have interpreted *Haslip* as providing blanket approval of nearly every punitive damages award and scheme.[11] These cases nod at, rather than

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tory award in one case, but permitting an effectively boundless punitive award in the other.

[9] Two justices of the West Virginia Supreme Court recognized the subjective nature of the "really mean"/"really stupid" test, and concurred separately to disassociate themselves from that "ridiculous categorization." App., *infra*, 53a-54a.

[10] *See, e.g., Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (compensatory damages $317,625, punitive damages $6.1 million), *cert. denied*, 112 S. Ct. 1778 (1992); *Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.) (Jury awarded $919,391 in compensatory damages and $5 million in punitive damages. Compensatory damages were reduced by 20% based on comparative fault, but punitive award left unchanged.), *review granted*, 822 P.2d 1194 (Or. 1991). Even where remittitur has been ordered, punitive awards often remain enormous. *See, e.g., General Motors Corp.* v. *Johnston*, 592 So. 2d 1054 (Ala. 1992) (compensatory damages of $75,000, punitive damages of $7.5 million as remitted); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (compensatory damages of $390,000, punitive damages of $28 million as remitted).

[11] *See, e.g., Coyne* v. *Allstate Ins. Co.*, 771 F. Supp. 673, 680-81 (E.D. Pa. 1991) (stating that Pennsylvania appellate courts provide the sort of "additional check on the . . . trial court's discretion" found crucial in *Haslip* even though the standards applied are abuse of discretion or the reviewing court's determination of excessiveness); *Commonwealth Lloyd's Ins. Co.* v. *Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992) (affirming $2 million punitive damages award based solely on adequacy of jury instruction, without requiring trial court review or conducting appellate review of the factors given to the jury), *writ of error filed* April 22, 1992; *Wolf* v. *Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. Ct. App. 1991) (holding Missouri procedure constitutional under *Haslip* although review for "excessiveness" conducted without articulated standards); *Oberg* v. *Honda Motor Co.*, *supra* note 10 (approving Oregon procedure under *Haslip* notwithstanding the state constitution permits reversal of jury awards of punitive damages only when the reviewing court finds a lack of *any* evidence supporting the award); *K-Mart Corp.* v. *Pearson*, 818 S.W.2d 410, 417 (Tex. Ct. App. 1991) (inter-

heed, the message of *Haslip* that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury," *id.* at 1043, are critical in ensuring that a punitive damages award falls on the acceptable side of a constitutional dividing line. A punitive damages award made with "unlimited jury discretion—or unlimited judicial discretion for that matter," *id.*, must indisputably fall "into the area of constitutional impropriety." *Id.* at 1046. If the intention of the Court in *Haslip* was to establish that all courts must give serious content to the Due Process Clause when approving punitive awards, that purpose has not been achieved. Accordingly, the Court should grant review in this case to make plain that *Haslip* and the Due Process Clause require genuine constraints on jury and judicial discretion, and that the vague, newly invented "test" for punitive damages awards announced by the West Virginia Supreme Court in this case provides no such constraints.

2. Even at first blush, the wide 526-to-one ratio in this case, which involved no personal injury of any sort, must immediately "jar one's constitutional sensibilities." *Id.* at 1043. In *Haslip*, where the ratio of punitive to compensatory damages was four to one, this Court stated that the "monetary comparison[] [was] wide," and might be "close to the line" of constitutional acceptability. *Id.* at 1046. This case, where the punitive damages are 526 times greater than the compensatory damages, is unquestionably out of bounds. In a case involving an alleged business tort, where no actual damages to the property right at issue were found,[12] a $10 million punitive damages award can scarcely be said to bear anything remotely approaching a "rational" relationship to the underlying

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mediate appellate court concluded without analysis that "the trial court's instruction did not give the jury unlimited discretion" under *Haslip*, and "found [the punitive damages award] to be reasonable").

[12] The "compensatory" award consisted of only the attorneys' fees expended by respondents in defending against TXO's declaratory judgment action. *See* App., *infra*, 20a-21a.

$19,000 award. 111 S. Ct. at 1045-46. Moreover, it stretches credulity to believe that an award of $10 million is required to deter TXO or other companies from taking similar actions in the future. While some state and federal courts have reached precisely that conclusion in holding *less* excessive awards to be unconstitutionally disproportionate, other courts have, like West Virginia, interpreted *Haslip* to allow virtually limitless punitive damages.[13] The conflicting decisions highlight the need for this Court's review.

Alexander & Alexander, Inc. v. *B. Dixon Evander & Associates*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992), is directly inconsistent with the West Virginia court's decision. There, an insurance agency and its agent were held liable for conspiracy and tortious interference with contracts held by the plaintiff, a self-employed insurance agent. The jury awarded $250,000 in compensatory damages and $40 million in punitive damages, a ratio of 160 to one. Although the trial court found the punitive damages award to be excessive, and remitted it to $12.5 million, 596 A.2d at 704, the Maryland Court of Special Appeals vacated that award and remanded for a new trial on punitive damages. The court found the punitive award—which as remitted was still 50 times the compensatory award—unconstitutional under *Haslip:*

> Not only is the $12.5 million allowed by the [trial] court extraordinary in terms of Maryland history, it is far in excess of the actual harm caused to [plaintiff], representing nearly fifty times the essentially liquidated compensatory damage . . . . If the $840,000 awarded in *Haslip* came "close to the line" in terms of the actual loss suffered, this surely crosses that line.

596 A.2d at 710-11. Accord, *Medical Mut. Liab. Ins. Soc.* v. *B. Dixon Evander & Assocs.*, *supra* (Same underlying

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[13] *See supra* note 10.

facts as in *Alexander & Alexander*, with compensatory damages of $1,725,000. Punitive damages award of $7 million vacated and remanded for retrial).

Importantly, in reversing punitive damages awards as unconstitutionally excessive, *Alexander & Alexander* and *Medical Mutual* both emphasized that the harm arose out of a business tort, not involving loss of life or limb or threat to public health and safety. Thus, the court in *Alexander & Alexander* noted that "[t]his was, at bottom, a commercial dispute between two business competitors." 596 A.2d at 710. A different panel of that court similarly found that the "commercial dispute that triggered the awards of punitive damages was not 'very high on the scale of reprehensibility.'" *Medical Mutual*, 1992 Md. App. LEXIS 144, at *49 (quoting *Alexander & Alexander*).

That characterization, of course, applies equally to the instant case. This case involves slander of title to property; TXO did not "endanger the public health or safety [and] its conduct was not life-threatening to anyone." *Alexander & Alexander*, 596 A.2d at 711. Thus, even a ratio far lower than 526 to one is inconsistent with constitutional norms. The approval of this award by the West Virginia Supreme Court is simply indefensible.

Even where the underlying conduct has involved egregious personal injuries or public safety risks, courts have found awards in ratios much smaller than the 526-to-one ratio here to be excessive. In *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), for example, the jury awarded a total of $9,025,000 in compensatory damages and $25 million in punitive damages against the defendant, a producer of a carcinogenic substance that caused the plaintiff to develop and eventually die from leukemia. The jury found that the defendant knew or should have known of the dangers, and that it was wholly at fault for its negligent failure

to ensure adequate warnings. The court of appeals found that the $25 million punitive award, 2.77 times larger than the compensatory award, was so excessive as to "shock the judicial conscience." *Id.* at 1561. In so finding, the court found fault with the fact that the "staggering sum" of $25 million bore "no necessary relation to the actual harm caused." *Id.* (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The court remanded with directions to enter remittitur to one-half the award, $12,500,000. *Id.*[14]

Haslip has unquestionably received mixed reactions by the lower courts. It has rightly been interpreted by some to place meaningful limits on the relationship between punitive and compensatory awards. It also has been interpreted to permit virtually limitless punitive awards. In sum, the issue has been allowed to percolate long enough in the lower courts. This case represents an extraordinary example of an overly lenient approach to excessiveness review and therefore provides an excellent vehicle for the Court to give further guidance on the precise meaning of its holding in *Haslip*.

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[14] *General Motors Corp.* v. *Johnston*, *supra* note 10, was a product liability and wrongful death case brought when a defective engine in a brand-new Chevrolet truck stalled in an intersection, and a seven-year-old passenger was killed in the resulting collision. The evidence showed that General Motors knew of the defect, but did not notify any of its customers in order to avoid expending the substantial sums necessary to recall and replace the defective part. The jury awarded $15 million in punitive damages and $75,000 in compensatory damages, a ratio of 200 to one. *Id.* at 1057. The awards were reviewed and approved by the trial court in accord with the Alabama standards validated in *Haslip*. The trial court could "find no reported decision in Alabama where a defendant's conduct even approached the degree of reprehensibility of Defendant General Motors' conduct in this case." *Id.* at 1061. Yet, upon review, the Alabama Supreme Court held that a remittitur to one-half the punitive award, $7.5 million, was required, *id.* at 1064, because punitive damages "should not exceed an amount that will accomplish society's goals of punishment and deterrence." *Id.* at 1063.

3. In *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), this Court held that a newly announced rule of federal law may not be applied in a "selectively prospective" fashion. In other words, it is no longer permissible to extend the benefits of a newly declared federal rule to the litigants in the case announcing the rule, but not to those whose cases arose on facts predating the pronouncement. Rather, under such circumstances, the rule must be applied retroactively. *Id.* at 2448. The West Virginia Supreme Court's decision in this case is contrary to that principle. This Court should grant review to clarify that the holding in *James Beam* applies to a state court insofar as the state court is interpreting and applying federal law.

In *Garnes* v. *Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court first analyzed the West Virginia procedure for awarding punitive damages in light of this Court's decision in *Haslip*. Finding that procedure to be inadequate under federal law as enunciated in *Haslip*, the court announced new procedural guidelines to bring West Virginia's punitive damages scheme into compliance with federal law. 413 S.E.2d at 908. The litigants before the court in *Garnes* had not had the protection of those guidelines; accordingly, the West Virginia court remanded that case for a new trial to be conducted under the new federal constitutional requirements it had articulated. *Id.* at 910-11.

In this case, as well, TXO was not protected by the procedural guidelines held to be constitutionally required in *Garnes*. Yet, the West Virginia Supreme Court did not remand the case as it did in *Garnes*. The result of the application of federal due process law to TXO in the West Virginia Supreme Court was thus wholly at odds with what would have happened in a federal court.

This Court's decision in *Felder* v. *Casey*, 487 U.S. 131 (1988), indicates that the Constitution forbids this result, and requires state courts to apply the principles of

James Beam to state decisions announcing or implementing new rules of federal law. In *Felder* v. *Casey*, which involved a federal civil rights action under 42 U.S.C. § 1983, the government defendants asserted that the suit could not be entertained because the plaintiff had failed to comply with Wisconsin's notice-of-claim statute. 487 U.S. at 135-36. That statute provided that no action might be brought against any state officer unless the claimant had provided, within 120 days of the alleged injury, written notice of the claim and the relief sought. *Id.* at 136-37. On appeal, the Wisconsin Supreme Court agreed, and the case was dismissed. *Id.* at 137-38.

This Court reversed. Notwithstanding that "States may establish the rules of procedure governing litigation in their own courts," a " 'federal right cannot be defeated by the forms of local practice.' " *Id.* at 138 (quoting *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949)). The Court concluded that because enforcement of the provision "will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court," the notice-of-claim provision was unconstitutional. *Id.* at 138, 151.

The same reasoning must undermine the West Virginia Supreme Court's decision in this case that the procedural safeguards established as a matter of federal constitutional law in *Garnes* need not be retroactively applied. As *Felder* illustrates, it is impermissible for state procedural rules to burden a litigant's federal right. Surely the constitutional infirmity is even clearer where a state court's concern with judicial economy results in such a burden. See App., *infra*, 32a ("TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in . . . *Garnes* were not met. To adopt such an approach to *Garnes* would unnecessarily send far too many cases back for retrial."). The West Virginia court's analysis cannot be reconciled with *James Beam* and *Felder*, and certiorari should be granted in order for this Court to make clear

that the holding of *James Beam* is fully applicable in the state courts.

Moreover, at least one court has already taken a conflicting view of the mandated course for a state court where it has applied a new federal-law ruling to the litigants before it. In *Seyller* v. *Pierce & Co.*, 816 S.W.2d 577 (Ark. 1991), a supplier wishing to impose a materialman's lien for which he had not given prior notice invoked Arkansas's "commercial construction" exception to the statutory notice requirement for such a lien. The Arkansas Supreme Court had "recently held the commercial construction exception to the notice requirement unconstitutional on equal protection and due process grounds." *Id.* at 580 (citing *Urrey Ceramic Tile Co.* v. *Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991)). The court held that it was required, as a threshold matter, to "decide whether to apply *Urrey* retroactively to this case which was pending before us when *Urrey* was decided." *Id.* The Arkansas court recognized an obligation under *James Beam* that, having "applied a rule of law to the litigants in one case, it must apply the same rule of law to all other litigants not barred by procedural requirements or *res judicata*." *Id.*[15]

This Court should thus grant review in order to prevent an unconstitutional rift between state and federal courts in their approaches to retroactive application of rulings

[15] The Arkansas court found, however, that the case before it differed from *James Beam* because "appellants [were] barred by the procedural requirement of preserving an issue in the trial court for [Supreme Court] review." *Seyller* v. *Pierce & Co.*, 816 S.W.2d 577, 580 (Ark. 1991). It was thus on the basis that there was a procedural bar that the Arkansas court held it need not apply its earlier decision. *Id.* at 580-81. Here, of course, there is no procedural bar. TXO argued in its motion for judgment *n.o.v.* that it had been denied due process because of the absence of meaningful standards for the jury and the trial court. App., *infra*, 56a-69a. On appeal, TXO made the same argument to the West Virginia Supreme Court, which determined that the case need not be remanded. App., *infra*, 32a-33a.

on federal law. As the decision of the Arkansas Supreme Court in *Seyller* shows, review is also merited to prevent such a rift among the state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JANUARY 1992 TERM

No. 20281

TXO PRODUCTION CORP., A DELAWARE CORPORATION
LICENSED TO DO BUSINESS IN WEST VIRGINIA,
Appellant

v.

ALLIANCE RESOURCES CORP., A TEXAS CORPORATION LICENSED TO DO BUSINESS IN WEST VIRGINIA; TUG FORK LAND COMPANY, A WEST VIRGINIA CORPORATION; GEORGE KING, AN INDIVIDUAL; AND GROVER C. GOODE, AN INDIVIDUAL,
Appellees

Appeal from the Circuit Court of McDowell County
Honorable Booker T. Stephens, Judge
Civil Action No. 85-C-550

AFFIRMED

Submitted: March 10, 1992

Filed: May 14, 1992

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JUSTICE NEELY delivered the Opinion of the Court.

MCHUGH, C. J., and MILLER, J., concur and reserve the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state." *W. Va. Code*, 2-1-1 [1923].

2. Slander of title is actionable under West Virginia common law.

3. The elements of slander of title are:

   1. publication of
   2. a false statement
   3. derogatory to plaintiff's title
   4. with malice
   5. causing special damages
   6. as a result of diminished value in the eyes of third parties.

4. A tenant in possession under a lease is estopped to deny the title of his landlord.

5. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus Point 3 of *Walker v. Monongahela Power Company*, 147 W. Va. 825, 131 S.E.2d 736 (1963).

6. Attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title.

7. Admission of extrinsic acts evidence under Rule 404(b) of the *West Virginia Rules of Evidence* [1985] may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

8. Protection against unfair prejudice from evidence admitted under Rule 404(b) of the *West Virginia Rules of Evidence* [1985] is provided by: (1) the requirement of Rule 404(b) that the evidence be offered for a proper purpose; (2) the relevancy requirement of Rule 402—as enforced through Rule 104(b); (3) the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and, (4) Rule 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

9. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of dis-

cretion.' *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983)." Syllabus Point 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

10. "Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Syllabus Point 4, *Gable v. The Kroger Co.*, —— W. Va. ——, 410 S.E.2d 701 (1991).

11. "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admissions of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syllabus Point 5, *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987).

12. Petitions for review of punitive damages awarded before 5 December 1991 should address each and every factor set forth in syllabus points 3 and 4 of *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991) with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.

13. "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully

explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant."

Syllabus Point 3, *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991).

14. "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syllabus Point 4, *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991).

15. The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, must higher ratios are not *per se* unconstitutional.

Neely, J.:

In this case, TXO Production Corporation, a subsidiary of USX, knowingly and intentionally brought a frivolous declaratory judgment action against the appellees to clear a purported cloud on title. TXO's real intent, however, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease. Appellees counterclaimed alleging that TXO's actions were a slander of appellees' title. TXO now appeals the verdict against it for $19,000 in compensatory damages and $10,000,000 in punitive damages assigning three primary errors: (1) no cause of action for slander of title exists in West Virginia, and even if it does, the appellees did not prove the essential elements of slander of title at trial; (2) the circuit court erred in admitting testimony of lawyers involved in suits against TXO in other states to show plan, knowledge and intent in contravention of the *West Virginia Rules of Evidence*; and (3) the award of punitive damages in this case is a violation of due process as enunciated in *Haslip v. Pacific Mutual Life Ins. Co.*, —— U.S. —— (1991) and *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991). We find no reversible error in the lower court's conduct of the trial and, because appellant and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur. Thus, we affirm.

I.

This case centers in the oil and gas development rights to 1,002.74 acres in McDowell County known as the "Blevins Tract." Tug Fork Land Company manages the Blevins Tract. In 1984, Tug Fork leased the oil and gas development rights to George King, doing business as Georgia Fuels. Mr. King in turn assigned his lease to Alliance Resources Corporation, reserving an overriding royalty interest to Georgia Fuels.

In late 1984, TXO became interested in the oil and gas in the Blevins Tract and approached Brian Robin-

son, the president and chairman of the board of Alliance Resources, about purchasing Alliance's rights in the Blevins Tract. Mr. Robinson declined to sell Alliance's interest outright but did propose a joint venture in which TXO would pay 75 percent of the drilling costs and Alliance Resources would pay 25 percent. Under this arrangement, Tug Fork would receive a 12.5 percent royalty, Georgia Fuels would receive a 6.25 percent royalty, and Alliance Resources would receive a 1 percent royalty, for a total royalty burden of 19.75 percent. TXO and Alliance would then share an 80.25 percent working interest. TXO rejected this proposal.

Only a few months later, in February, 1985, however, TXO approached Mr. Robinson with a much better offer. TXO offered to pay all of the drilling costs, pay 22 percent in royalties, *and* pay Alliance $20 per acre for its interest in the Blevins Tract. Mr. Robinson accepted what he considered to be such a "phenomenal offer." [1]

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[1] The pertinent parts of the 2 April 1985 agreement state:

> The interest in said leases assigned Assignee hereunder shall be subject to such interest's proportionate part of the royalty interest as provided for in said leases and to the terms, conditions and provisions set forth therein. Such interest shall also be subject to such interest's proportionate part of all overriding royalties, production payments and any other payments and agreements of record.
>
> This Assignment is further made expressly subject to the following:
>
> (1) Assignor reserves unto itself, its successors and assigns, an overriding royalty interest equal to the difference between existing lease burdens and twenty-two percent (22%) of all of the oil, gas and other liquid or gaseous hydrocarbons produced and saved from or attributable to said leases during the terms thereof; provided, however, that the overriding royalty interest herein reserved shall be proportionately reduced if any of said leases do not cover a full mineral interest and/or this Assignment does not convey full leasehold rights in any of said leases. The overriding royalty interest reserved hereby shall bear its proportionate part of all production, severance or other similar taxes.
>
> (2) Assignor hereby warrants title to the extent that in the event of conducting title examination of the assigned acreage, Assignee's examining attorney determines that title has failed to all or any part of the assigned acreage, Assignor will reimburse to Assignee the consideration paid to it for any such lands to which title is determined to have failed.

TXO then retained the Ripley law firm of Skeen and Skeen to examine the title to the Blevins Tract. According to the title report prepared by the Skeens, there was a problem with a 1958 deed from Tug Fork to Leo J. Signaigo, Jr.[2] TXO's agent, Duncan Wood, then contacted Mr. Signaigo who told him that the 1958 deed did not include the transfer from Tug Fork to Mr. Signaigo of rights to the oil and gas. Nevertheless, shortly thereafter Mr. Wood approached Mr. Signaigo with a pre-printed affidavit for Mr. Signaigo to sign. The affidavit *falsely* stated that Mr. Signaigo could not say whether the oil and gas rights were included in the 1958 deed. The complete contents of the tendered affidavit are as follows:

> My name is Leo J. Signaigo, Jr. and I am involved in the coal business. On September 2nd, 1958, I purchased the coal and other minerals under certain tracts of real estate from Tug Fork Land Company. A copy of this deed is attached hereto and incorporated herein for all purposes. However, *there was no specific agreement on the part of myself or Tug Fork Land Company as to whether or not the oil and gas would be reserved by Tug Fork Land Company* in the attached deed, other than in the Pocahontas No. 3 and No. 4 coal seams. There-

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[2] Mr. Signaigo later conveyed his interest in the coal rights to Pocahontas Empire (now doing business as Hawley Coal Mining Corporation), which in turn conveyed its interest to Virginia Crews Coal Company.

fore, *I did not know whether or not the oil and gas was included in the conveyance to me* and as a consequence, after I purchased this mineral property. I was assessed for 1,002.74 acres, mineral or timber, Hensley Creek. *In the event Tug Fork Land Company would claim that we had a specific agreement that the oil and gas was not to be conveyed under any of the properties, I could not agree wtih such conclusions as there was not such a specific agreement.* Further affiant saith not. (Emphasis added.)

Because the affidavit was false, Mr. Signaigo refused to sign it.

The pertinent parts of the 1958 Signaigo deed state:

> 1. That for and in consideration of the sum of One ($1.00) Dollar, cash in hand paid, and other good and valuable considerations not herein set forth, the receipt and sufficiency of all of which is hereby acknowledged, the said party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty of title, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land, situate in Browns Creek District, McDowell County, West Virginia, together with the mining rights and privileges hereinafter set forth, but subject to the exceptions, reservations, stipulations and agreements hereinafter set forth, to-wit:
>
> [A description of the Blevins tract is included here.]
>
> * * * *
>
> 6. It is understood and agreed that there is excepted and reserved to the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

Although the deed does not demonstrate the most artful drafting, it does *clearly reserve all of the oil and gas under the Blevins Tract to Tug Fork Land Company.*[3] To make it perfectly clear why this Court so unequivocally finds that the deed was unambiguous, we include the entire deed as Appendix A.

Having decided that there was either a real or a contrived problem with title to the oil and gas, and still without having brought the potential problem to the attention of any of the appellees, TXO paid $6,000 to Virginia Crews (*see* note 2, *supra*) in exchange for a quitclaim deed that was recorded 11 July 1985. TXO told none of the appellees about any possible defect in title until *after* it had recorded its quitclaim deed.

After recording its quitclaim deed, TXO held a meeting on 14 or 15 August 1985 (the date is inconsistent in the record), attended by several of its employees, the title lawyer Mr. Larry Skeen, and Mr. Brian Robinson. The parties disagree about what occurred at this meeting.

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[3] According to Theodore M. Streit, Director, Oil and Gas Division of Environmental Protection, West Virginia Department of Commerce, Labor and Environmental Resources, a deed for the oil and gas underlying the Pocahontas 3 and 4 seams of coal would have been ridiculous in 1958. Gas wells are drilled much deeper than coal seams, and while modern gas recovery technology does, on occasion, lead producers to recover the methane imbedded in specific seams of coal, that would never have been done in 1958. Thus, any reading of the reservation clause which would imply that the grantor reserved only the oil and gas within the Pocahontas 3 and 4 seams of coal would have been ridiculous and contrary to all custom and usage at the time the deed was executed.

Mr. Robinson testified that during this meeting, Mr. Skeen very aggressively explained to him why the lease by Alliance Resources was not valid under West Virginia law. Mr. Robinson also testified that TXO asked for concessions and that TXO threatened to file suit if the appellees did not make concessions on the royalties. On the other hand, Mr. Skeen testified that, although "[he did not] remember what all we went over," he did not tell Mr. Robinson that Alliance didn't have title. Mr. Wood, a TXO landman, testified that TXO did not ask for any concessions on royalties at this meeting.

In the case before us no one disputes that before beginning to drill, any reasonable businessman would want to clear up any clouds on the title to the oil and gas rights, no matter how small. Therefore, we understand that before investing hundreds of thousands of dollars in an exploratory well on the Blevins Tract, TXO would have wanted to fork out $6,000 for an insurance policy against litigation in the form of a quitclaim deed. However, instead of clearing the title directly by making the grantee of the quitclaim Tug Fork or approaching the appellees to discuss the title problem, TXO attempted to use the purported cloud as leverage for increasing its interest in the oil and gas rights.

Shortly after the 14 or 15 August meeting, on 23 August 1985, TXO filed its action for a declaratory judgment to quit title. The appellees counterclaimed alleging slander of title. The circuit court then bifurcated the issues for trial. In the declaratory judgment action, the circuit court found the terms of the 1958 deed from Tug Fork to Mr. Signaigo to be clear and unambiguous and held that title to the oil and gas was vested in Tug Fork as leased to Alliance Resources through George King. On the counterclaim, a jury awarded appellees $19,000 in compensatory damages and $10,000,000 in punitive damages.

II.

A.

TXO argues that there is no action for slander of title in West Virginia. Although there is no West Virginia case on record directly recognizing an action for slander of title, the *West Virginia Constitution*, Article VIII, Section 13, provides:

> Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

Also, *W. Va. Code*, 2-1-1 [1923] provides:

> The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state.

Interpreting these provisions, we stated in Syllabus Point 2 of *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979):

> Article VIII, Section 13 of the West Virginia Constitution and W. Va. Code, 2-1-1, were not intended to operate as a bar to this Court's evolution of common law principles, included its historic power to alter or amend the common law.

Although we recognized the ability of this Court to alter and amend the common law in *Morningstar*, we certainly did not imply that the common law was in any way abrogated as it stood. Quite to the contrary, the *West*

Virginia Constitution commands that we recognize the English common law as of 1863.[4] Recognizing this fact, we now look to the common law.

Slander of title long has been recognized as a common law cause of action. Indeed, the slander of title cause of action was especially important 400 years ago when many transfers of land were oral transfers (i.e., feoffment with livery of seisin), and when, the Domesday Book notwithstanding, land records were much less complete than they are today. In the 32nd and 33rd years of Elizabeth I (c. 1591), the Queen's Bench found for the plaintiff on a claim of slander of title in *Gerrard against Dickenson*, 78 Eng. Rep. 452. Although 400 years old, *Gerrard* has some similarities to the case before us. The defendant claimed that she had a lease on the land of the plaintiff, which she did not have. The defendant offered several objections, but the court found for the plaintiff.

Later, in the 5th year of James I (c. 1608) the King's Bench also found for a plaintiff on a slander of title claim in *Earl of Northumberland against Byrt*, 79 Eng. Rep. 143. In *Byrt*, the defendant falsely said that the previous owner of the land in question had made a lease of it before his death. The defendant also claimed that the lease had then been conveyed to him. The court found this actionable as slander of title and held for the plaintiff. Examining these cases, it is clear that an action for slander of title has been a part of English common law for at least 400 years.

The one possible defense for TXO that these cases raise, however, is that "if a man claim estates [as his own], although they be false he shall not be punished." *See Pennyman against Rabanks*, 78 Eng. Rep. 668 (c.

[4] The common law in effect in West Virginia is traditional English common law, as amended by the Virginia legislature prior to 1863 and as amended by the West Virginia legislature.

1596). TXO maintained strenuously at oral argument that only allegations that title is held *by a third party* are actionable and that a person cannot slander title by asserting title in himself. Originally, falsely claiming title for oneself was not actionable as slander of title. However, at least by the end of the 16th century, the English courts had begun to do away with the distinction between claiming title in oneself and alleging the superior title of another. As discussed *supra*, unrecorded conveyances were much more important 400 years ago and the courts, therefore, sought to protect those who asserted unrecorded conveyances to themselves. In *Pennyman*, for example, the court stated:

> This was agreed by all the Court, that no action lay against one for saying, that he himself had title or estate in lands, &c. although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title.—Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shown upon the third day of the next term.[5]

A distinction between claiming title in oneself and claiming title in another arises for a logical reason. Although we want to discourage people from slandering the title of others, we do not want to discourage people from making legitimate (though possibly weak) claims of their own. Therefore, we also distinguish between cases in which the claimant legitimately raises questions of title in himself and cases in which the claimant raises

[5] First stating the rule and then neatly side-stepping it, the Court of Common Pleas demonstrates that judicial double talk was not pioneered in the 20th century.

his own claim without any reasonable grounds. Although the courts of the 16th and 17th centuries had not yet clearly enunciated this distinction, they did follow it. The courts circumvented the general rule whenever the defendant had not acted in good faith. Consider *Gerrard*, *supra*, in which the defendant falsely claimed a lease on land as her own. Notwithstanding the defendants' objection that she could not slander title by claiming it in herself, the court found for the plaintiff because the defendant relied on a deed that she knew had been forged. When, therefore, a defendant knows that his claim is false, he cannot rely on the defense of claiming title in himself.

Because of the *West Virginia Constitution*'s incorporation of the common law of England, we find that an action for slander of title could always be brought in West Virginia.[6] We also find that claiming title in oneself without any reasonable basis can give rise to a claim for slander of title.

B.

The *Restatement (Second) of the Law of Torts* (1977) provides the guidelines that modern courts generally follow in identifying the elements of slander of title. *Restatement (Second) of the Law of Torts* § 623A (1977) provides:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

[6] The Fourth Circuit Court of Appeals has also determined that slander of title is a recognized cause of action in Virginia. *See Lomah Elect. Targetry v. ATA Tr. Aids Assist. Pty.*, 828 F.2d 1021 (4th Cir. 1987).

> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Restatement (Second) of the Law of Torts § 624 (1977) provides:

> The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property.

From the Restatement, we can deduce the elements of slander of title:

1. publication of
2. a false statement
3. derogatory to plaintiff's title
4. with malice
5. causing special damages
6. as a result of diminished value in the eyes of third parties.

See also W. P. Keeton, Prosser and Keeton on Torts (5th ed. 1984 at § 128); *Williams v. Burns*, 540 F.Supp. 1243 (D. Colo. 1982). Although perhaps more neatly set out, these are the same elements required at least as far back as *Gerrard* in 1591.

C.

The jury found that by recording a quitclaim deed which it knew to be frivolous, TXO satisfied the requirements for slander of title. TXO argues that recording a quitclaim deed cannot be construed as the publication

of a frivolous statement with the intent to prevent others from dealing with the claimant as required for an action for slander of title. We disagree. Recording a quitclaim deed that one knows to be frivolous is no different from saying to a potential purchaser—"I don't think you should buy that land. You know there is a cloud on the title because of Mr. Signaigo's old deed." Therefore, we agree with the Supreme Court of Montana which stated in a slander of title action in *Jumping Rainbow Ranch v. Conklin*, 538 P.2d 1027, —— (Mont. 1975):

> [T]he action of [the defendant] in filing his quitclaim deed was such as to warrant the necessary showing of malice to entitle plaintiff to punitive damages.

As a general rule, courts have found that wrongfully recording an unfounded claim to the property of another is actionable as slander of title. *See, e.g.*, Annotation, "Recording of Instrument Purporting to Affect Title as Slander of Title," 39 A.L.R.2d 840, and cases cited therein. This is so provided that the other elements for slander of title, namely malice and special damages, are present.

Even if (unlikely as this may be) the circuit court had found that there was a legitimate cloud on the title because of the deed to Mr. Signaigo, TXO (as an expert in all aspects of land law) undoubtedly knew that a tenant in possession under a lease is estopped from denying the title of his landlord. *See* Trial transcript at 614 (testimony of TXO's agent, Duncan Wood, confirming, in a general way, that he was aware at the time that such a rule existed.) As we said in *Voss v. King*, 33 W. Va. 236, 239, 10 S.E. 402, —— (1889):

> [A] tenant in possession under a lease is not permitted to dispute the title of his landlord. This as a general principle of law is well settled both in England and in this country.

Although it has been a number of years since we have addressed the issue, the well-settled general rule is still that:

> [D]uring the existence of the relation of landlord and tenant, the tenant is estopped to deny his landlord's title. 49 Am. Jur.2d Landlord and Tenant § 109 (1970).

If, however, an honest mistake had arisen and TXO had mistakenly taken the quitclaim deed from Virginia Crews in its name instead of Tug Fork's name (but had not filed a suit against the appellees to challenge the title of TXO's own landlord while still in possession and claiming under the lease), the counterclaim for slander of title would never have arisen. Certainly, a jury would not have found malice in TXO's actions.

At trial, and again on appeal, TXO argued that there was no malice in its actions, and that the filing of the false quitclaim deed was the result of a good faith mistake. However, after the testimony about TXO's efforts to reduce royalty payments and much testimony about previous similar bad acts by TXO (*see*, Section III, *infra*), the jury found the requisite malice. The testimony regarding the August meeting is conflicting, and when we examine conflicting testimony, we look to Syllabus Point 3 of *Walker v. Monongahela Power Company*, 147 W. Va. 825, 131 S.E.2d 736 (1963), where we stated:

> In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.

Furthermore, TXO's employee, Duncan Wood, testified that TXO never made a request to Alliance for simple reimbursement of the expenses in acquiring the quitclaim

deed. *See* Trial transcript at 618. This leads to the logical inference that TXO's real intent was to negotiate substantially lower royalties with appellees, thus reducing the market value of the appellees' interest in the lease in the eyes of any prospective third party purchasers. Therefore, we take Mr. Robinson's version of these events as accurate.

Not only do the details of the August meeting as related by Mr. Robinson suggest malice on the part of TXO, but the facts of Mr. Woods' dealings with Mr. Signaigo also show unsavory and malicious practices by TXO. When examined in the light most favorable to the appellees, the evidence clearly shows that TXO intentionally and maliciously recorded a quitclaim deed that *it knew to be without any basis in fact* because Mr. Signaigo explicitly told TXO that he had not bought the oil and gas on the Blevins Tract in 1958. Furthermore, the record shows that this was not an isolated incident on TXO's part—a mere excess of zeal by poorly supervised, low level employees—but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power *vis á vis* TXO's superior legal firepower.

TXO argues that the $19,000 in attorneys' fees incurred by the appellees in defending against TXO's suit to remove the cloud from appellees' title are not special damages. Ordinarily, attorneys' fees are not considered damages. However, slander of title is a special case. The appellees spent $19,000 responding to TXO's declaratory judgment action that the appellees would not have spent if TXO had not filed the false quitclaim deed and then sued the appellees in an attempt to steal their land. We follow the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title. *See, e.g., Rayl v. Shull Enterprises, Inc.*, 700 P.2d 567 (Idaho 1984); *Summa Corp. v. Greenspun*, 655

P.2d 513 (Nev. 1982); *Paulson v. Kustom Enterprises, Inc.*, 157 Mont. 188, 483 P.2d 700 (1971); *Dowse v. Doris Trust Co.*, 116 Utah 106, 208 P.2d 956 (1949); *Chesbro v. Powers*, 78 Mich. 472, 44 N.W. 290 (1889); *Den-Gar Enterprises v. Romero*, 94 New Mexico 425, 611 P.2d 119 (Ct. App. 1980), *cert. denied*, 94 New Mexico 628, 634 P.2d 545 (1980). *See also Restatement (Second) of the Law of Torts*, § 633 (1977).[7]

III.

A.

TXO's second group of assignments of error involve the introduction, as part of appellees' case in chief, of certain testimony about prior bad acts perpetrated by TXO. One of TXO's defenses at trial was good faith or the lack of malice. The appellees introduced testimony by four lawyers, under Rule 404(b) of the *West Virginia Rules of Evidence* [1985], to help establish a lack of good faith by TXO. TXO claims that the introduction of this evidence was a violation of Rules 404(b), 402, 403 and 802 of the *West Virginia Rules of Evidence* [1985].

The testimony at issue are the videotaped depositions of R. H. Madden, III, a Ruston, Louisiana lawyer; Clar-

[7] Section 633 states:

(1) *The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to*

(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and

(b) *the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.*

(2) This pecuniary loss may be established by

(a) proof of the conduct of specific persons, or

(b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify. (Emphasis added.)

ence Bufford Harrison, Jr., a Richardson, Texas lawyer; James P. Pruitt, a lawyer from Dallas and, Allan DeVore, a lawyer from Oklahoma City. The circuit court thoroughly examined each of these depositions before trial and excluded some parts of the testimony to which TXO had objected.

Mr. Madden testified about litigation that he initiated against TXO for his client Carrie Calloway. Ms. Calloway is an elderly, functionally illiterate woman who lives in Louisiana. Her son contacted Mr. Madden because he believed that TXO was taking gas from his mother's land without paying her for it. Near the end of February, 1988, Mr. Madden contacted John Wright in TXO's Shreveport office and informed him that he was representing Ms. Calloway. Mr. Madden testified that on 4 March 1988, David McDonald and Kevin Treadway, representatives of TXO, came to Ms. Calloway's house to discuss her interest in the gas TXO had been producing. Ms. Calloway told the TXO representatives that they should contact Mr. Madden. However, the TXO representatives told Ms. Calloway that neither she nor they needed to talk to Mr. Madden, and that all she needed to do was sign some papers or else her neighbors could not continue to receive their royalty payments. Not wanting to prevent her neighbors from receiving money that was rightfully theirs, Ms. Calloway signed the tendered document. Ms. Calloway could not read this document and the TXO representatives did not leave her a copy of it. Ms. Calloway told Mr. Madden that the gentlemen were at her house about 1:00 p.m. on 4 March 1988. At 2:21 p.m. that same day, a lease (which was the tendered document) was filed in the local clerk of court's office. Subsequently, TXO settled the case favorably to Ms. Calloway.

Mr. Harrison testified about some wells in Texas in which he owned an interest. He testified that TXO had

been producing from his wells for almost a year without paying him any royalties. He stated:

> They had given us a list of excuses a mile long of why they hadn't paid. *One of them was we don't know if the title's good to the tract. Well, our tract was where the well was located and that title was cured before the well was drilled.*
>
> Well, they gave us excuse after excuse after excuse. When we got the bill we figured they owed us 150 or $200,000. And our part of the frack job was about $50,000, so we figured since they owed us more than we owed them we weren't going to pay them.
>
> Never forget one day my partner, I was in his office, and he was registered agent for the company and a lawyer from TXO called and said we are going to sue you for that $50,000. And he said, well, good. And the comment from the lawyer on the other end of the phone was, you don't seem too upset. And he said, well, you're going to look awful silly suing us for 50,000 when you owe us 200,000. The lawyer then got a little bit upset about that and decided to go ahead and pay.

Trial transcript at 265 (Emphasis added.)

Mr. Harrison also testified that, in another case, TXO under-reported the gas it had produced from a well, and therefore failed to pay the royalties it should have paid.

Mr. Pruitt, an oil and gas lawyer, testified about litigation he had instituted (personally and on behalf of clients) against TXO in 1984. After investigating the situation, Mr. Pruitt discovered that TXO had been paying minimal shut-in royalties to him and others, when in fact, TXO had been producing out of his well and other

wells.[8] Shortly after the lawsuit was filed, Mr. Pruitt testified, TXO settled the case.

Mr. DeVore testified about some ongoing litigation in Oklahoma. He had examined depositions, discovery requests, interrogatories and other documents in the office of the county clerk where the litigation was taking place. He explained that there was a tract of land on which TXO wanted to drill. Under Oklahoma law, there was a procedure through which any owner of land within a tract could gain drilling rights. TXO initiated this procedure, although it did not own any of the land. In essence TXO sent a letter to a group of landowners saying TXO was going to drill a well and individual landowners could either get in on it or not. However, TXO had no right to drill without the landowners' permission, and no right to send this letter. Through this questionable tactic, TXO was able to acquire an interest from one of the existing owners, and by acquiring this interest through fraud and misrepresentation, go on to drill the well it had threatened to drill.

Mr. DeVore also testified about a pending cast, *Freede v. Texas Oil and Gas Corp. and TXO Production Corp.* From the court documents available to him (or to any other member of the public), Mr. DeVore testified that he *thought* "that TXO had violated the rights of Dr. Freede and hundreds or thousands of other people across the nation, as a result of this willful, wanton action." Trial transcript at 315. He also explained the details of the then-pending lawsuit by Dr. Freede. After the trial of appellees' case here in West Virginia, however, an Oklahoma jury *found for TXO* in the case brought by Dr. Freede.

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[8] In many oil and gas contracts, the producer (in this case, TXO) agrees to pay a minimum royalty to the landowner even when the well is not producing. These are called shut-in royalties.

B.

TXO argues that all of the testimony discussed in subsection A above should have been excluded under Rule 404(b) of the *West Virginia Rules of Evidence* [1985]. Rule 404(b) of the *West Virginia Rules of Evidence* [1985] provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Huddleston v. U. S.*, 485 U. S. 681 (1988), the U. S. Supreme Court discussed the admission of "other acts" evidence under Rule 404(b) of the *Fed. R. Evid.* The Court held that "other acts" evidence need not be proved by a preponderance of the evidence before it can be submitted to the jury. The Court stated:

> "[S]uch evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."

Id. at 685.

The Court also stated:

> "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, *especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.*" *Id.* (Emphasis added.)

The Court held that the first inquiry a trial court must make is whether the proffered evidence is probative of a material issue other than character. The Court also found that protection against unfair prejudice emanates from four sources:

> [F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . . and fourth, from *Fed. R. of Evid.* 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted . . . .

Id. at 691-92.

We find the U. S. Supreme Court's reasoning in *Huddleston* persuasive and we here use its analysis to examine the admission of the other acts evidence in the case before us. Examining the first requirement, the testimony was offered in this case to prove malice, which is a necessary element in an action for slander of title. TXO strenuously maintained at trial that no matter how the facts appeared in this case, it had simply made a good faith mistake. The appellees offered their evidence of other evil acts to disprove TXO's good faith defense and to show that this case was but part of a pattern and practice of deception and chiseling by TXO.

For the second requirement, we look to Rules 401 and 402 of the *West Virginia Rules of Evidence* [1985]. Rule 401 of the *West Virginia Rules of Evidence* [1985] provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 of the *West Virginia Rules of Evidence* [1985] provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of West Virginia, these rules, or other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.

The proffered evidence was clearly relevant to the issue of malice. Furthermore, as we stated in Syllabus Point 2 of *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983):

> "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, [171 W. Va. 623], 301 S.E.2d 596, 599 (1983)."

For the third requirement, we look to Rule 403 of the *West Virginia Rule of Evidence* [1985] which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

And we recently stated in *Gable v. The Kroger Co.*, —— W. Va. ——, ——, 410 S.E.2d 701, 705 (1991):

> Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice to the defendant. Such decisions are left to the sound discretion of the trial judge . . . .

In this case, we find that the trial judge was correct in holding that any unfair prejudice to TXO did not substantially outweigh the probative value of the testimony.

Fourth, TXO did not request a limiting instruction regarding the other acts testimony. Therefore, we find this other acts evidence was appropriately admitted under Rule 404(b) of the *West Virginia Rules of Evidence* [1985].

TXO makes particular note of the testimony by Mr. DeVore about the *Freede* case from Oklahoma because that case was subsequently won by TXO.[9] The fact that a jury found for TXO in *Freede* does not mean that any of the particular facts to which Mr. DeVore testified is untrue. More importantly, TXO had an opportunity to cross-examine Mr. DeVore, and also had an opportunity to put on testimony of its own to contradict Mr. DeVore. Furthermore, we find that, given the weight of the other testimony, any error in admitting Mr. DeVore's testimony about the *Freede* case was harmless.

C.

More problematic than TXO's vociferous objections to admission of all of this testimony under Rule 404, is that particular parts of this testimony were based on hearsay. *West Virginia Rule of Evidence* 801(c) provides:

> (c) *Hearsay.*—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

West Virginia Rule of Evidence 802 provides:

> Hearsay is not admissible except as provided by these rules.

Apparently, at the deposition, appellees' attorney offered this testimony believing it to be protected by the hearsay exception codified in Rule 803(6) of the *West*

[9] Well, even a blind hog finds an acorn now and again.

Virginia Rules of Evidence [1985]. Rule 803(6) of the *West Virginia Rules of Evidence* provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Most jurisdictions have held that this exception is applicable only when the hearsay declarant is under a business duty to provide the information. *See, e.g., United States v. Bortnovsky*, 879 F.2d 30 (2nd Cir. 1989); *Ramrattan v. Burger King Corp.*, 656 F.Supp. (D. Md. 1987); *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F.Supp. 1049 (W.D. Mo. 1985); and *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F.Supp. 1257 (N.D. Ohi) 1980). In the case before us, the out-of-court declarants were *not under a business duty* to provide the information. However, we need not decide the admissibility of the testimony under the business records exception because the testimony is admissible under Rule 803 (24) of the *West Virginia Rules of Evidence* [1985].

The purpose of excluding hearsay testimony at trial is to prevent unreliable information from reaching the jury. Because not all statements that are hearsay as defined by Rule 801(c) of the *West Virginia Rules of Evidence* [1985] are unreliable, we have incorporated a number of specific traditional common law hearsay exceptions (such

as the business records exception) into Rules 803 and 804 of the *West Virginia Rules of Evidence* [1985]. Rules 803(24) and 804(b)(5) also provide "catch-all" exceptions to cover other reliable hearsay statements.

Rule 803(24) of the *West Virginia Rules of Evidence* [1985] provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Interpreting Rule 804 (b)(5) of the *West Virginia Rules of Evidence* [1985], the counterpart to Rule 803 (24) of the *West Virginia Rules of Evidence* [1985], in Syllabus Point 5 of *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987), we stated:

> The language of Rule 804(b)(5) of the *West Virginia Rules of Evidence* and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admissions of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

As we stated in *Smith*, our major concern with any evidence admitted under this exception is its reliability. We find the hearsay statements within the testimony of the four lawyers both credible and reliable. The hearsay statements were made about specific people, places and events—all of which TXO controlled the evidence to controvert, if the witnesses' statements were not true. For instance, Mr. Madden testified about a specific day and time on which specific TXO employeees went to visit Ms. Calloway and how TXO committed specific acts. TXO could have called its own employees, and Ms. Calloway for that matter, to disprove the statements, but it chose not to do so.

Second, as we explained above, this evidence is clearly probative of the material issue of whether TXO acted with malice.

Third, because of the concise manner in which the evidence was presented, because of the ease with which any untrue testimony could have been impeached, and because of the difficulty of appellees' obtaining any other evidence on this material issue, we find that these statements were more probative than any other evidence that the appellees could have reasonably procured.

Fourth, the admission of these statements comports with the general purpose of the *West Virginia Rules of Evidence* [1985] and the interests of justice.

Fifth, TXO clearly had more than adequate notice that these statements were going to be offered at trial. The hearsay statements were not offered live, but in previously prepared videotaped depositions. TXO was represented by its lawyers at each of these videotaped sessions. If there were any evidence available to rebut the statements made by these four witnesses, TXO had more than ample and fair opportunty to provide that evidence. Thus, to the extent that appellees attempted to show the jury where TXO's victims' bodies were buried, each body allegedly buried was meticulously marked by time of death and tombstone location well in advance of trial.

Therefore, we find that the trial court did not abuse its discretion in admitting the "other acts" evidence under Rule 404(b) of the *West Virginia Rules of Evidence* [1985], and that the hearsay statements within this testimony were admissible under Rule 803(24) of the *West Virginia Rules of Evidence* [1985].

IV.

TXO finally asks that we set aside the punitive damages award. The first issue that we must consider in this regard is the applicability of *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E. 2d 897 (1991) to those cases still on appeal that were decided before we handed down our decision in *Garnes*. TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in syllabus points 3 and 4 of *Garnes* were not met. To adopt such an approach to *Garnes* would unnecessarily send far too many cases back for retrial. We will, however, be especially diligent in our review of any punitive damages awards entered before *Garnes* was decided. We adopt this flexible approach to *Garnes* because we have already held that petitions for review of punitive damages awarded before 5 December 1991 must:

> "Address each and every factor set forth in syllabus points 3 and 4 of [*Garnes*] with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage."

Syllabus point 5, *Garnes v. Fleming Landfill*, —— W. Va. ——, 413 S.E.2d 897 (1991).

In Syllabus Point 3 of *Garnes*, we stated:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that

the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

In Syllabus Point 4 of *Garnes*, we stated:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuit pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

We set out these guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*, *supra*. Just as we recognized in *Garnes* that there can be no mathematical bright line relationship between punitive damages and compensatory damages, we cannot simply examine these nine criteria seriatim, awarding a certain number of points to each. The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards.

Originally, punitive damages were awarded only to deter malicious and mean-spirited conduct. However, the punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm.[10] Generally, then, we can distinguish between the "really mean" punitive damages defendant, and the "really stupid" punitive damages defendant. We want to discourage both forms of unpleasant conduct, but not necessarily with the same level of punitive damages.

Although there is no mechanical mathematical formula to use in all punitive damages cases, we think it appropriate here to offer some broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages.

We have examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable. Generally, the cases fall into three categories: (1) really stupid de-

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[10] Even if Ford Motor Company had not intentionally left gas tanks in the wrong position on its Pinto automobile, we would still want to allow high levels of punitive damages against Ford in order to encourage Ford to make reasonable efforts to insure that bureaucratic bungling and red tape would not lead to the deaths of consumers. *See, Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d, 174 Cal. Rptr. 348 (1981).

fendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.[11]

By really stupid defendants, we signify those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness—in most cases caused by a foul-up in the middle of some corporate bureaucracy that has pushed some victim into a red-tape limbo. Consider, for example, *Principal Financial Group v. Thomas*, 585 So.2d 816 (Ala. 1991), *cert. denied* —— U.S. —— (1991), in which an insurance company spent tens of thousands of dollars at trial and on appeal to defend its failure to pay $1,000 to a mother who had lost her child. The insurance company claimed that the child was not really a dependent of the mother. Outraged at the insurance company's conduct, the jury awarded not only $1,000 in compensatory damages, but also $750,000 in punitive damages. The Supreme Court of Alabama (whose review procedure was endorsed by the U.S. Supreme Court in *Haslip, supra*) upheld the verdict.

As we discussed in *Garnes*, one of the reasons we allow punitive damages in these "stupid" cases is to give individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants. In a world with only smaller, closely held businesses, we would not need punitive damages for this type of case. Once Joe, the owner of Joe's Automobile Company, realizes that there is a foul up in his business that is causing problems for his customers, he has plenty of incentive to correct it. However, compensatory damages do not always provide sufficient

[11] See our tables of cases in Appendix B. Although it is sometimes difficult to distinguish between the mean cases and the stupid cases just by reading the appellate opinion, we have given it our best efforts. For example, if we tried to place the *Thomas* case, discussed *infra*, into a category, we could have called it a mean case or we could have said that it was only the worst case of bureaucratic bungling in history.

incentive for the middle managers who make these types of decisions for a major automobile company with hundreds of thousands of employees and agents. As we noted in discussing claims against insurance companies in *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986).

> Unfortunately, in the business of claims settlement we do not have simply two parties—the company that wishes to pay the lowest legitimate amount of money and the policyholder who wants maximum benefits under the policy. Between these two profit-maximizing, rational players, there is an entire corporate bureaucracy composed of agents, administrators, corporate counsel, and local litigating lawyers. This bureaucracy is neither inherently good nor inherently evil, and it performs a necessary function in the insurance industry. Nonetheless, the claims settlement bureaucracy is subject to the same dynamics as every other bureaucracy known to man: its natural tendency is to maximize upward mobility for middle management members of the bureaucracy and to augment the work that the bureaucracy is responsible for doing. In government, this phenomenon is often referred to as "turf protection." The extent to which pernicious dynamics prevail in any particular company's claims bureaucracy differs from company to company and from office to office within the same company. However, a policyholder who runs into an intransigent or unreasonable claims settlement bureaucracy is destined to be sorely put upon.

The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.) The possibility of punitive damages, however, increases the possibility of a higher payout. The higher the potential payout, then, the further up the corporate hierarchy the

decision is passed. A reasonable level of punitive damages therefore increases the likelihood that settlement decisions will be made by upper management employees who own stock in the company or who at least feel a higher level of fiduciary duty to the stockholders.

By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful. For example, in *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), which we discussed in *Garnes*, the defendant insurance company failed to pay Ms. Eichenseer's obviously *legitimate* claim. Ms. Eichenseer was subjected to numerous "misinterpretations" of her claim as well as the "loss" of her medical records. Furthermore, the insurance company made no effort to pay Ms. Eichenseer's claim until *after* she filed her lawsuit. The Fifth Circuit then upheld punitive damages 500 times the compensatory damages.

We cannot say that our examination of post-*Haslip* cases has led us to a crystal clear bright line rule. Not surprisingly, some courts have been less willing than this Court in *Garnes* to take seriously the U.S. Supreme Court's guidance. We do find a pattern, however, of what we believe are reasonable verdicts under the *Haslip* and *Garnes* standards.

In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large (*see* our discussion of those terms in *Hayseeds, supra*) we hold that the outer limit of punitive damages is *roughly* five to one.

This is not necessarily the case, however, when compensatory damages are minimal. In cases such as *Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991), in which the potential for harm from the defendant's conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a

ratio much greater than five to one were entirely appropriate.[12]

When the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant. For instance, the United States Supreme Court upheld a punitive damages award with a ratio of more than 117 to 1 in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In the really mean cases, the cynosure in determining the reasonableness of the jury's verdict under *Haslip* and *Garnes* is the amount of punitive damages required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct.

Accordingly, we find that in cases where the defendant has intentionally committed mean-spirited and harmful acts (especially when the provable compensatory damages are small, but the potential of harm is great), even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*. The appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention because, as we said in *Garnes*, an award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's. *See Garnes* at —, 413 S.E.2d at 910.

In applying the Garnes "reasonable relationship" test to the case before us, we look to: (1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to

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[12] Concomitantly, if the compensatory damages are very high then punitive damages even in the ratio of 5:1 might be excessive. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (compensatory damages of $9.025 million; punitive damages remitted to $12.5 million from $25 million).

discourage TXO from undertaking such endeavors in the future. The type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit.

TXO also argues that the jury were allowed to consider irrelevant financial information under the fifth criterion from Syllabus Point 3 of *Garnes*. By interrogatory, appellees attempted to find out about the finances of TXO Production Corp.[13] Because the appellees were unable to obtain information about the worth of TXO Production Corp. from TXO, the appellees provided their own expert to testify about the worth of the TXO Division of USX. Using public financial statements for USX, the expert testified that the net worth of the TXO Division of USX was between $2.2 billion and $2.5 billion. TXO argues that because the TXO division is "comprised of at least 15 corporate entities in addition to TXO Production Corp." (Appellant Brief at 37), the introduction of this testimony was unfairly prejudicial.

First, TXO was not forthcoming during discovery with information about the worth of TXO Production Corporation, nor did TXO offer such evidence at trial. Furthermore, even lingering on this point obscures the more important issue. The worth of the TXO Division of USX, and the worth of USX for that matter, is relevant. If we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporat-

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[13] Appellees 4th Set of Interrogatories Nos. 5, 6 and 7, along with TXO's answers are as follows:

5. State the name and address of the stockholders of TXO Production Corp.

ANSWER: Texas Oil & Gas Corp.—owns 100% of outstanding stock.

1700 Pacific Avenue
First City Center
Dallas, Texas 75201

6. Since 1980 to present has TXO Production Corp. filed a separate corporate tax return?

ANSWER: No.

7. Since 1980 have the profits and/or losses of TXO Production Corp. been subsumed in or as a part of income tax returns of another corporation?

ANSWER: Not sure of term "subsumed". Dictionary definition would not appear to apply. If by term it is meant made part of or incorporated into parent company, the answer is yes.

If so,

(A) State the name and address of any corporation in which the profits and/or losses of TXO Production Corp. were subsumed, and the year or years in which each such corporate entity has subsumed the profits and/or losses of TXO Production Corp.

ANSWER: 1980-86—Texas Oil & Gas Corp.
1986-Present—USX Corporation
600 Grant Street
Pittsburgh, PA 15230

(B) Defendant requests plaintiff produce copies of each of the above tax returns since 1980 in which the profits and/or losses of TXO Production Corp. have been incorporated and attach the same with your answers hereto.

ANSWER: Objection. The returns are too large and burdensome to copy and include. Moreover, they also combine the income and losses of a number of other companies (subsidiaries), but are not broken down on the returns by subsidiary and TXO's profit or loss could therefore not be determined by a review of such returns. Nothing short of a full audit at extreme expense could answer interrogatory which TXO is not prepared to do at its own cost.

ing separate departments as a number of undercapitalized subsidiaries. It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury verdict must reach.[14] Consequently, we find that the punitive damages awarded in this case were not so unreasonable as to demonstrate such passion and prejudice that a new trial is warranted.

V.

The jury in this case correctly found willful and deliberate injury. Accordingly, the judgment of the Circuit Court of McDowell County is affirmed.

Affirmed.

[14] When pressed at oral argument, TXO's counsel admitted that USX has the power to: 1) elect the Board of Directors, 2) appoint all officers through the Board, and 3) generally control the operations of TXO Production Corp. Indeed, it is undisputed that at the end of the chain of related companies, TXO has but one stockholder, to-wit USX.

APPENDIX A

THIS DEED, made and entered into this the 2nd day of September, 1958, by and between TUG FORK LAND COMPANY, a West Virginia corporation, party of the first part, and LEO J. SIGNAIGO, Jr., party of the second part.

WITNESSETH:

1. That for and in consideration of the sum of One ($1.00) Dollar, cash in hand paid, and other good and valuable considerations not herein set forth, the receipt and sufficiency of all of which is hereby acknowledged, the said party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty of title, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land, situate in Browns Creek District, McDowell County, West Virginia, together with the mining rights and privileges hereinafter set forth, but subject to the exceptions, reservations, stipulations and agreements hereinafter set forth, to-wit:

PARCEL NO. 1: That certain tract or parcel of real estate on upper Hensley Branch, McDowell County, West Virginia, more particularly bounded and described as follows:

BEGINNING at a spruce pine on a spur about 300 feet West of Upper Hensley Branch, and 500 feet from Tug River, a corner of the Alex Trent 50½ acre tract; thence by a line running in a northeasterly direction parallel with and 20 feet below the outcrop of the Davy seam of coal, 2050 feet to a point in a line of the Alex Trent 50½ acres; thence with a part of one line of the A. Trent 50½ acres, S. 19 W. 1040 feet to a fallen spruce pine and maple; thence with one line of the A. Trent 50½ acres, S. 38 30 W. 1056 feet to the place of BEGINNING, containing 7.64 acres.

PARCEL NO. 2: That certain tract or parcel of land, situated on Upper Hensley Creek and Lower Hensley Creek and the waters of Tug River, in McDowell County, West Virginia, more particularly bounded and described as follows, to-wit:

BEGINNING at a double hemlock on a spur about 300 feet west of Upper Hensley Creek and about 500 feet from Tug River; thence S. 30 deg. 20′ W. 230 feet to a point in a line of Alex Trent 150 acres; thence with same and crossing old line of Norfolk and Western Railway to a point on the north bank of Tug River: thence with said bank of same Westward to the center of Lower Hensley Branch; thence leaving Tug River and up said Lower Hensley Creek N. 45 deg. W. 80 feet; N. 35 deg. 50′ W. 755 feet; N. 20 deg. 05′ W. 305 feet; N. 60 deg. 50′ W. 350 feet; N. 9 deg. 25′ E. 105 feet; N. 34 deg. 05′ W. 305 feet; N. 25 deg. 42′ W. 299 feet; N. 61 deg. 00′ W. 347 feet; N. 66 deg. 12′ W. 202 feet; N. 42 deg. 10′ W. 421 feet; N. 81 deg. 00′ W. 376 feet; N. 37 deg. 00′ W. 428 feet; N. 58 deg. 05′ W. 253 feet to a point in the creek at the fork; thence up the right Fork N. 44 deg. 45′ W. 363 feet; N. 0 deg. 10′ W. 218 feet; N. 25 deg. 15′ E. 154 feet; N. 13 deg. 20′ E. 163 feet; N. 33 deg. 54′ E. 38.5 feet; N. 58 deg. 30′ E. 181 feet; N. 1 deg. 50′ W. 195 feet; N. 26 deg. 20′ E. 162 feet; N. 6 deg. 45′ W. 301 feet; N. 9 deg. 30′ W. 231 feet; N. 24 deg. 12′ W. 161 feet; N. 22 deg. 45′ W. 154 feet; N. 56 deg. 25′ W. 160 feet to a point in the branch at a fork; thence up the right hand fork N. 48 deg. 30′ E. 710 feet; N. 34 deg. 00′ E. 179 feet; N. 2 deg. 25′ E. 247 feet; N. 27 deg. 25′ E. 357 feet; N. 45 deg. 35′ E. 150 feet to a point on the back line of the McCormick survey; thence with the said line S. 66 deg. 10′ E. 4300 feet to a point on the side line of the Hensley Land Company; thence with the side lines of said Hensley Land Company S. 11 deg. 53′ E. 1440 feet to a

dogwood and white oak; thence S. 8 deg. 10′ W. 780 feet to a point 20 feet below the outcrop of the Davy seam of coal; thence around the hill with a line parallel to and 20 feet below the said outcrop, S. 34 deg. 28′ W. 100 feet; S. 32 deg. 50′ W. 135 feet; S. 19 deg. 50 W. 277 feet; S. 10 deg. 52′ W. 259 feet; S. 42 deg. 52′ W. 120 feet; S. 52 deg. 33′ W. 113 feet; S. 20 deg. 50′ W. 370 feet; S. 22 deg. 43′ W. 153 feet; S. 16 deg. 00′ W. 149 feet; S. 23 deg. 17′ W. 65 feet; S. 66 deg. 07′ W. 58 feet; S. 73 deg. 00′ W. 25 feet to the point of BEGINNING, containing an area of 455 acres, more or less.

PARCEL NO. 3: That certain tract or parcel of land, lying on the waters of Tug River and West of Lower Hensley Creek, in McDowell County, West Virginia, more particularly bounded and described as follows, to-wit:

BEGINNING on an iron rail by a sycamore on the outcrop of the Sewell seam of coal in the first left hand hollow of Lower Hensley, a corner of Hampton Roads Collieries Company, and with one line of same S. 48 deg. 40′ W. 6380 feet to an iron rail in the right of way on the old line of the Norfolk and Western Railroad; thence with said right of way in a westerly direction for a distance of about 740 feet to a stake; thence leaving said right of way, up the center of a drain, N. 1 deg. 11′ W. 336 feet; N. 32 deg. 47′ W. 487 feet; N. 26 deg. 50′ W. 216 feet; N. 19 deg. 14′ W. 303 feet; N. 6 deg. 00′ W. 216 feet; N. 33 deg. 15′ W. 257 feet to a stake by two hickories near the head of a drain; thence N. 27 deg. 00′ E. 6072 feet to a stake in the center of Lower Hensley Creek; thence down said Lower Hensley Creek S. 70 deg. 00′ e. 1225 feet to a stake in the forks of said Creek; thence continuing down said creek S. 58 deg. 05′ E. 253 feet; S. 37 deg. 00′ E. 428 feet; S. 81 deg. 00′ E. 376 feet; S. 42 deg. 10′ E. 421 feet; S. 66 deg. 12′ E. 202 feet; S. 61 deg. 0′

E. 347 feet; S. 25 deg. 42′ E. 299 feet; S. 34 deg. 05′ E. 355 feet; S. 9 deg. 25′ W. 109 feet; S. 60 deg. 05′ E. 350 feet; S. 20 deg. 05′ E. 305 feet; S. 35 deg. 50′ E. 755 feet to a point in old line of Norfolk and Western Railroad right of way; thence with said right of way in a southern direction for a distance of 730 feet to a point on said right of way, a corner of Hampton Roads Collieries Company; thence straight up the hill, and with several lines of said Hampton Roads Collieries Company, S. 80 deg. 39′ W. 135 feet to a stake on the outcrop of the Sewell seam of coal; thence N. 9 deg. 20′ W. 71 feet; N. 10 deg. 27′ W. 37 feet; n. 25 deg. 26′ W. 77 feet; N. 7 deg. 35′ E. 97 feet; N. 20 deg. 53′ W. 51 feet; N. 13 deg. 28′ E. 117 feet; N. 8 deg. 48′ E. 38 feet; N. 12 deg. 53′ E. 96 feet; N. 49 deg. 53′ W. 225 feet; N. 81 deg. 57′ W. 70 feet; S. 87 deg. 38′ W. 144 feet; N. 77 deg. 10′ W. 140 feet to the BEGINNING, containing 547.7 acres, more or less; and being a part of the tract of land known as the Warren-Simpson Tract.

Being the same tracts or parcels of land which were conveyed by Famous Pocahontas Coal Company, a corporation, to Roderfield Realty Company, a corporation, by deed dated January 1, 1945, and recorded in the office of the Clerk of the County Court of McDowell County, West Virginia, in Deed Book No. 162, page 459; and being also a portion of the property conveyed to the party of the first part hereto by Roderfield Realty Company, a corporation, by deed dated May 16, 1958, and recorded in said Clerk's office in Deed Book No. 237, page 518, reference to both of which deeds is hereby made.

2. There is excepted and reserved from the operation of this deed:

(a) All the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described.

(b) All the timber situate on the tract of land herein described in Paragraph 1 as "PARCEL NO. 2", situate on the watershed of Upper Hensley Branch, sold by R. L. Page and wife to the J.B.B. Coal Company.

(c) All rights of way heretofore acquired by the Norfolk and Western Railway Company in or on any of the tracts above described.

(d) All rights of way heretofore acquired by the Appalachian Electric Power Company in or on any of the tracts above described.

(e) All rights of way heretofore acquired by the Chesapeake and Potomac Telephone Company in or on any of the tracts above described.

(f) The surface of that certain tract or parcel of land, containing 50 acres, more or less, out of the 547.7 acre tract hereinbefore described in Paragraph 1 as "PARCEL NO. 3", heretofore conveyed by Famous Pocahontas Coal Company, predecessor in title of the party of the first part, to Mrs. Cora Lee Smith, by deed dated April 15, 1940, and of record in said Clerk's office in Deed Book No. 159, page 288, to which deed reference is here made for a description of the surface land in this paragraph excepted.

(g) All that certain tract or parcel of land, containing 7.6 acres, more or less, out of the 547.7 acre tract hereinbefore described in Paragraph 1 as "PARCEL NO. 3", heretofore conveyed by Famous Pocahontas Coal Company, predecessor in title of the party of the first part, to S. M. Burgess, by deed dated December 2, 1938, and of record in said Clerk's office in Deed Book No. 141, page 103, to which deed reference is here made for a description of the tract of land in this paragraph excepted and reserved.

(h) The remaining surface in all of said tracts of land heretofore conveyed by Roderfield Realty Company, prede-

cessor in title of the party of the first part, to J. A. Blevins, by deed dated October 29, 1945, and recorded in said Clerk's office in Deed Book No. 165, page 420, reference to which deed is hereby made for a description of the surface land in this paragraph excepted and reserved.

3. This deed is made subject to the following described instruments:

(1) Agreement between Roderfield Realty Company, predecessor in title of the party of the first part, and United Fuel Gas Company, dated October 8, 1956, and recorded in said Clerk's office in Deed Book No. 227, page 412.

(2) Agreement between Famous Pocahontas Coal Company, predecessor in title of the party of the first part, and Hope Natural Gas Company, dated December 17, 1942, and recorded in said Clerk's office in Deed Book No. 156, page 133.

(3) All leases of the surface of the real estate hereinbefore described, which are now in existence, whether or [sic] record in said Clerk's office or not.

4. As a part of the consideration aforesaid, the party of the first part does hereby give and grant to the party of the second part the right and privilege of using, in common with the party of the first part, a strip of land thirty (30) feet in width up said Hensley Creek, as a right of way to the lands lying in the rear of the tract or parcel of land conveyed by Famous Pocahontas Coal Company to S. M. Burgess, by deed dated December 2, 1938, and recorded in said Clerk's office in Deed Book No. 141, page 103, to which deed reference is here made for a metes and bounds description of the tract of land through which said right of way extends.

5. As a part of the consideration aforesaid, the party of the f st part does hereby give and grant to the party

of the second part, to be used and enjoyed by him in common with the party of the first part, all the mining rights and privileges in connection with or appurtenant to said coal and minerals hereby granted, which the party of the first part has or is entitled to, incident to the ownership of the coal and minerals hereby conveyed, and specifically, but not by way of limitation or exclusion:

a. All and singular the mining rights and privileges excepted and reserved to Roderfield Realty Company, predecessor in title of the party of the first part, in that certain deed dated October 29, 1945, from Roderfield Realty Company to J. A. Blevins, of record in said Clerk's office in Deed Book No. 165, page 420, to which deed reference is here made for a description of said mining rights and privileges, and which said mining rights and privileges are now held and owned by the party of the first part.

b. All and singular the mining rights and privileges excepted and reserved to Famous Pocahontas Coal Company, predecessor in title of the party of the first part, in that certain deed dated April 15, 1940, from Famous Pocahontas Coal Company to Mrs. Cora Lee Smith, recorded in said Clerk's office in Deed Book No. 159, page 288, to which deed reference is hereby made for a description of said mining rights and privileges, and which said mining rights and privileges are now held and owned by the party of the first part.

6. It is understood and agreed that there is excepted and reserved to the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

7. It is further understood and agreed that, should the party of the first part be desirous of selling the coal in said No. 3 and No. 4 Pocahontas seams in, on or underlying said tracts of land, it shall first offer said seams of coal to the party of the second part for the time being at a price to be named by the party of the first part; and if the party of the second part shall not, within sixty (60) days, accept such offer, then the party of the first part shall be at liberty to sell said seams of coal to any other person, firm or corporation at the same or higher price, but shall not sell said seams to any other person, firm or corporation at a lower price, unless and until it shall have been offered to the party of the second part for the time being at such less price and such last-mentioned offer shall not have been accepted by the party of the second part within said sixty (60) day period.

8. It is further understood and agreed that the phrases "party of the first part" and "party of the second part" shall include not only the parties thereto, but their respective successors, heirs, legal representatives and assigns.

9. TO HAVE AND TO HOLD said coal and other minerals and mineral substances and said mining rights and privileges, together with the appurtenances thereunto belonging or in any wise appertaining, but subject to the exceptions, reservations, stipulations and agreements hereinbefore set forth, unto the party of the second part, his heirs and assigns, forever.

IN TESTIMONY WHEREOF, the said Tug Fork Land Company has caused these presents to be signed in its corporate name by its President, and has caused its corporate seal to be hereunto affixed; all as of the day, month and year first above written.

TUG FORK LAND COMPANY,

By Henry C. Barley
President

APPENDIX B

STUPID

Case	Punitive	Compensatory	Ratio
Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991)	$12,500,000	$9,025,000	1.4:1
Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991)	$5,000,000	$106,514	46.9:1
A. Doe, et al. v. B.P.S. Guard Services, Inc., 945 F.2d 1422 (5th Cir. 1991)	$35,000	$1,000	35:1
Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991) *cert. denied* —— U.S. ——, 112 S.Ct. 1175	$1,300,000	$5,001	260:1
Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991)	$87,500	$2,500	35:1
Liberty Transport, Inc., v. Harry W. Gorst Co., Inc., 229 Cal.App. 3d 417, 280 Cal.Rptr. 159 (Ca. App. 2 Dist. 1991)	$400,000	$82,500	4.8:1
Jennings v. Jessen, 407 S.E.2d 264 (N.C. App. 1991)	$300,000	vacated	—
Wolfe v. Goodyear Tire & Rubber Co., 808 S.W.2d 868 (Mo. App. 1991)	$250,000	$49,500	5.1:1
United Farm Bureau Mut. Ins. Co. v. Ira, 577 N.E.2d 588 (Ind. App. 1991)	$105,000	$55,000	1.9:1
Muehlstedt v. City of Lino Lakes, 473 N.W.2d 892 (Minn. App. 1991)	$70,000	$35,000	2:1

MEAN

Case	Punitive	Compensatory	Ratio
Browning-Ferris v. Kelco Industries, 492 U.S. 257 (1989)	$6,000,000	$51,000	117.6:1
Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991), *rehearing denied* 951 F.2d 347, *cert. denied* —— U.S. ——, —— S.Ct. ——, 1992 WL 41923	$6,100,000	$317,625	19.2:1
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991)	$500,000	$1,000	500:1
Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991)	$28,000,000	$390,000	71.8:1
Robertson Oil Co., Inc. v. Phillips Petroleum Co., 779 F. Supp. 994 (W.D. Ark. 1991)	$8,000,000	$750,000	10.7:1
General Motors Corp. v. Johnston, 592 So.2d 1054 (Ala. 1992)	$7,500,000	$75,000	100:1

APPENDIX B

TXO Production Corp. v. Alliance Resources Corp.
No. 20281

[Filed July 22, 1992]

McHugh, Chief Justice, concurring:

Although I concur with much of the majority's analysis in the present case, I disagree with the majority's categorization of defendants against whom punitive damages have been awarded. The majority opinion categorizes these defendants as either "really mean" or "really stupid." In its cavalier attempt to be clever and amusing, the majority opinion has carelessly ignored the fundamental factors which have traditionally been used by courts to characterize the conduct of defendants in assessing punitive damages.

Punitive damages have historically been part of our state tort law. As the law has developed in this area, certain terms have been established to characterize the degree of reprehensibility of the defendant's conduct.

Our traditional rule summarizing the type of conduct that will give rise to punitive damages is found in syllabus point 1 of *Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991):

> "'"In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes, it, the jury may assess exemplary, punitive, or vindictive damages. . . ." Syllabus point 4, in part, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895).' Syllabus point 1, *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1932).

Not surprisingly, none of the courts in the punitive damages cases cited by the majority use the terms "really

stupid" or "really mean" when describing the defendant's actions in their review of the punitive damage awards. Instead, when characterizing the defendant's conduct, those courts use terms such as "conscious indifference," *Glassock v. Armstrong Cork Co.*, 946 F.2d 1085, 1093 (5th Cir. 1991), *reh'g denied*, 951 F.2d 347, *cert. denied*, *Celotex Corp. v. Glasscock*, 112 S. Ct. 1778, 118 L. Ed. 2d 435 (1992); "reckless, willful and wanton," *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 505 (4th Cir. 1991); "particularly egregious," *Eichoncoer v. Reserve Life Ins. Co.*, 944 F.2d 1377, 1382 (5th Cir. 1991); and "reprehensible," *Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501, 502 (Ga. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1175, 117 L. Ed. 2d 420 (1992) and *Gamble v. Stevenson*, 406 S.E.2d 350, 355 (S.C. 1991).

These terms are well-founded in our tort law, and I can see no useful purpose whatsoever in abandoning these terms for the ridiculous categorization proposed by the majority in its opinion today. The terms noted above are those upon which attorneys and judges have traditionally relied in assessing punitive damages awards. Unfortunately, by suggesting the use of such subjective and nontechnical terms as "really stupid" and "really mean," the majority has offered no practical guidance to attorneys or judges in analyzing punitive damages cases.

I am authorized to state that Justice Miller joins me in this concurring opinion.

APPENDIX C

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action No. 85-C-550

TXO PRODUCTION CORP., a Delaware corporation licensed to do business in West Virginia; AMERICAN PETROFINA COMPANY OF TEXAS, a corp.; FINADEL, INC., a corporation; APCOT-FINADEL GENERAL PARTNERSHIP, a Texas general partnership; and APCOT-FINADEL JOINT VENTURE, a general partnership,

Plaintiffs

v.

ALLIANCE RESOURCES CORP., a Texas corp., licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,

Defendants

Partial proceedings had and testimony taken in the trial of the above styled action before Honorable Bocker T. Stephens, Judge, and a jury, on Monday, June 18, 1990, Thursday, June 21, 1990, and Friday, June 22, 1990.

APPEARANCES

MR. TIMOTHY M. MILLER, Charleston, West Virginia, Counsel for the Plaintiffs.

MR. G. DAVID BRUMFIELD, Welch, West Virginia, Counsel for the Defendant Alliance Resources Corp.

MR. WADE T. WATSON, Bluefield, West Virginia, Counsel for the Defendant Tug Fork Land Company.

MR. GROVER C. GOODE, Welch, West Virginia, Counsel for the Defendant Grover C. Goode and Defendant George King.

* * * *

[792]

THURSDAY, SEPTEMBER 20, 1990
1:00 O'CLOCK P.M.

The proceedings at the hearing of motions on behalf of the plaintiff in the foregoing action were held before the Court with Timothy M. Miller, Esquire, Charleston, West Virginia, representing the plaintiff; G. David Brumfield, Esquire, Welch, West Virginia, representing the defendant Alliance Resources Corp. and Wade T. Watson, Esquire, Bluefield, West Virginia, representing the defendant Tug Fork Land Company, and were as follows:

THE COURT: The matters before the Court in this case are a motion to compel surety of bond, motion for judgment notwithstanding the verdict or in the alternative, motion for a new trial and in the second alternative, motion for remittitur. I also have a motion for TXO Production Corporation for a stay of enforcement of judgment pending appeal. Are those the only matters that are before me at this time?

MR. MILLER: That's correct, Your Honor.

THE COURT: Do you all agree?

MR. WATSON: Yes, sir. That's all.

THE COURT: All right. Let me take up the motion for judgment notwithstanding the verdict for a new trial. Let's do that first and let me say to you, I have read everything you [793] sent down here and it seems as if, and I just want you, in order to, I don't want to keep you from arguing anything, but it seems as if I have previously ruled on everything you have raised, except maybe the last two things that deal with punitive damages. Am I correct in my thinking on that?

MR. MILLER: You're correct, Your Honor, and as I was going to say, I was going to limit my argument today to the fact that we've briefed many of the issues that you see before you in the pre-trial stage for motions which are the motions to dismiss, motions in limine, as well as we placed those arguments on record at trial, so

I was going to limit my argument to those issues that may be new or there may be some new authorities in this case.

THE COURT: I would appreciate that and I am fairly consistent in my rulings.

MR. MILLER: I thought you would be, Your Honor.

THE COURT: My rulings don't usually change unless the Supreme Court changes them in their wisdom, because I feel I've looked at it very carefully. And I respect the fact that you may need to argue if there are new authorities in those areas that I have previously ruled on, but I would appreciate it, also, if you would just limit yourself to new matters. And I'm just saying for the record now that my previous rulings will not change in that respect. Okay?

MR. MILLER: I understand, Your Honor.

[794] THE COURT: All right.

MR. MILLER: And, again, I— I should start off by apologizing to the Court for submitting any brief 45 pages in length, but I felt compelled to because of the issues that had to be raised and we were compelled to raise them under the post-trial motions rule, but I think the first eight issues in our brief are clearly matters which the Court had previously ruled upon. We cited authorities. As you will recall, we submitted to you bench briefs, motions for summary judgments, motions to dismiss and motions in limine in virtually all of the evidentiary issues which are raised in the brief on the post-trial stage. I'm going to therefore try to limit my argument, if I can, to the issues which appear under argument IX related to the other acts and just point out to the Court a few authorities that may not have been cited in the motion in limine stage and that also then go primarily to the punitive damage arguments which I think are the last three arguments in the brief.

THE COURT: Very well.

MR. MILLER: So going to the Rule 404b argument, and, as you know, Your Honor, the, TXO objected at

trial to the video tape deposition of four attorneys who testified with respect to other litigation against TXO in Louisiana, Texas and Oklahoma. I thought that was violative of Rule 404b, as well as Rule 402, 403 and 802. In our brief, we did cite to you the various [795] authorities and in particular, Your Honor, when we briefed it before, we did not go into much elaborate discussion of the West Virginia case law. I think we cited to you various Fourth Circuit cases which deal with a need for reliability and the necessity of the evidence and the fact that there must be a legal connection between the acts or other acts and a tendency to show some motive, plan or intent in this litigation. But in State v. Thomas, Your Honor, as you will recall, Judge Hayden writing for the Court, indicated that there had to be a legal connection between the other crimes or acts and the one in litigation here and we felt that the testimony clearly showed, failed to show any relationship between those acts, either in point of time or, in other words, they were not close in proximity in time or they were not the same types of causes of action. Several of them were royalty disputes. Nor did they show any similarity of the parties in terms of their being. In this particular case you will recall the witnesses, Mike Good, Doug Black, Duncan Wood, etc., there was no evidence showing that those individuals had any connection whatsoever with the acts arising in other jurisdictions.

We feel that under that test in State v. Thomas, which is an old Fourth Circuit case, are also commented upon by Professor Cleckley in the same discussion on the subject but none of them is legal requirements of a legal connection were made in this case and therefore the evidence should not have been allowed in or [796] should have been stricken. I think all of the authorities we cited here are consistent in that regard and we cited the Fourth Circuit cases because of the lack of any particular West Virginia cases dealing directly with that point—the point on recent vintage.

THE COURT: Well, the ultimate test on that would be the balancing test under Rule 403. Would you tend to agree with that?

MR. MILLER: Actually, I think it was Professor Cleckley said that first of all, you have to go to relevancy.

THE COURT: Yeah.

MR. MILLER: That deals with a legal connection test.

THE COURT: It's— Then the ultimate test would be the balancing test as to whether or not the Court would let it in or not would be the balancing test under Rule 403.

MR. MILLER: That's part and parcel of it, yes.

THE COURT: Sure. Okay.

MR. MILLER: I won't belabor that point too much since we had briefed that pretty extensively before.

I'm going, then, really, to the issue here of excessiveness of the punitive damage award in this case. I think we did brief that on three aspects. No. 1, the admissibility of the testimony of Alliance's economist, Mr. Bruce Conrad, and I think that issue goes hand in hand with the question of the amount of the excessiveness of the punitive damage award. I think it was [797] clear by Mr. Conrad's testimony—First of all, we certainly admit under West Virginia law that one of the tests for punitive damages or one of the factors the jury should consider in awarding punitive damages is the financial standing or the ability of the party in this case, but I think it very clear from the discussion of the West Virginia case law, all talks in terms of financial ability of the party in the trial before the Court. We cited to you the cases that speak to that but don't directly talk about the case where you have a consolidated financial statement coming in evidence as we have here. Mr. Conrad admitted during cross-examination that his analysis of net worth was based upon a USX annual report and the composite net worth of 20 corporations identified as the TXO Division. For that reason, we moved to, over objection to the evidence in the first place, we then moved to strike the testi-

mony of Mr. Conrad, which the Court denied. I think the only cases or the new authority that I would like to point you to on page 29 of the brief. As I've indicated, we could not find West Virginia authorities directly on point that relate to this subject. We did find a number of cases from, one from Indiana, an intermediate appellate court in Indiana, an Alabama case and several federal district court cases. I'd like to point out that in each of those cases the only way the evidence was admitted in the first case, in Neal v. Cary Canadian Mines, that was one of the national asbestos suits [798] in which numerous parties were brought before the Court in action arising in the third district, U.S. District Court in Pennsylvania, in which Johns Manville was one of the parties, along with numerous Johns Manville subsidiaries and several of the defendants in that case had acquired the interest of a number of asbestos manufacturers and distributors. In that case, the court, without a whole lot of discussion, nevertheless felt that in that case the cause of action arose from the acts of the parent Johns Manville corporation and accordingly it was relevant to allow the consolidated financial return of Johns Manville Corporation, the parent in evidence.

The other cases, the intermediate appellate court in Indiana, was faced with a situation where the parent corporation piercing the corporate veil, a theory had been alleged, pursued and in that case actually tried. I believe that's the one where the parent corporation was actually made a party to the case by amendment of the pleadings. In the third case, the Alabama case, there was no objection made to the consolidated financial returns coming in at that trial and that was in large measure the reason for the appellate court saying that it was too late to raise that on appeal. The federal cases, the A. L. Laboratories case and the Herman v. Hess will case more directly on point very clearly indicated it would be error to admit the consolidated return in that case. Those were additional [799] authorities that, from a national

scope, we wanted to cite to you in this brief and I do not believe you have before you a brief of the issue before.

I think it was clear, though, Your Honor, that allowing in the testimony as to the composite net worth of the TXO Division is what gave rise to the excessive punitive damage award in this case. Analyzing it just from a West Virginia standpoint of what constitutes an excessive award, I think the authorities we cited to you make it pretty clear and in reviewing this more in a historical basis, I think you can see almost two lines of authority coming up through West Virginia law in the last hundred years. Cases which looked at it strictly on a mathematical ratio basis to determine what was an excessive award and typically they would look at those and I think I can represent to the Court there are a number of cases that held ratios of three to one of punitive to compensatory, while reviewed with an eye toward their excessiveness, typically would be considered to be reasonable under the facts and circumstances of certain case. Ratios of five to one in Leach v. Biscayne Oil, the '82 case. That was a ratio in issue there. The court indicated that under the facts of that case, that could be considered a reasonable ratio and under the other cases, that ratio has been analyzed, and I think cases of ten to one and above typically draw the ire of the Supreme Court as being excessive.

[800] Now, in Leach v. Biscayne Oil, they upheld a five to one ratio. And basically in the facts of that case, you had an oil and gas company which trespassed intentionally upon someone's land and did not have title to do that. Took a bulldozer, tore down a tree, built an access road to a well, constructed a well, put oil tanks on a well site and in the process destroyed a number of timbers, timber land, Your Honor. And then after the well was put in production, the storage tank leaked gas, a fire was started and it burned down additional acreage. In that case, we had about $8,000.00 compensatory, $44,000.00 punitive. The Court held that under the facts and circumstances of that case that the proportion of five to one is not unrea-

sonable, given the facts which seemed to show rather malicious spirit or intent in that case and actually they lost timber in that case.

Wells v. Smith has been briefed to Your Honor. While many people argue that that was the death knell of any analysis of proportional mathematical basis, I think we cited to you the language of that case which clearly showed it is still reasonable for the trial court to look at that proportionality to determine what is an excessive award. And in this particular case, the ratio is 526 to 1 and I think under any analysis by any of our old cases, under the first line of authority I mentioned to you, that would have clearly been excessive and awarded setting aside of the verdict as shocking the conscience, monstrous and [801] showing passion and prejudice. Even under the new line of authority, Your Honor, where the ratio is but one factor to be taken into consideration, the court seems to say that that ratio can be, certainly, evidence that should justify a finding by the court of passion, prejudice and setting it aside. But that the court should also look to the nature of the cause of action, the type of injuries actually suffered by the parties and that the ratio alone does not control. In this case, I think it was apparent from the jury's findings in this case that the only compensatory damages that they awarded were the attorney's fees incurred in the quiet title action. That was not on trial. If you recall, we were trying only the counterclaim in this case. And in essence, therefore, found there was no injury in fact to the parties. Over our objection, we had the testimony of Brian Robinson and an official from the Department of Energy about the oil and gas properties in question, yet there were no awards of damages that would relate to, to indicate that the jury felt there was any kind of compensatory damage or injuries in fact suffered by the parties in this case. That being the case, that ratio is obviously much greater than 526 to 1, but I think under the Wells v Smith analysis, if you look at the ratio, it appears patently excessive. And then if you consider the fact that there was no in-

jury in fact, and by that I mean, Your Honor, our Supreme Court in defamation cases, which may be [802] of some analogous help in looking at this case, have upheld awards because the personal reputation of a person awarded damages may have been destroyed. While that person could not show an actual economic loss, nevertheless our courts have held in defamation cases before that if a person's reputation may not be able to be equated to a dollar and cents value, but there were some vindictive rights to compensation which you can't equate just between compensatory and puntive damages.

In this case, there was no testimony to show that this allegedly libelous publication was distributed to a third party. Under any liable case, one essential element is for it to be published to a third party and because of that, in the eyes of maybe that third person or the community, the reputation of the wrong party is involved. There was no testimony to that fact. There's merely testimony here that because we had to go through a quiet title action, we have these attorney's fees and expenses, etc. to clear that title. Another factor, Your Honor, is the fact that it was a temporary injury, if any injury at all. In connection with filing the quit claim deed, TXO initiated the declaratory judgment action so that this Court could, once and for all, clear title to these oil and gas properties in question. The Court did that. So there is no continuing injury like you would have with a personal injury case or you might have somebody with continuing medical bills or suffering from anguish of disfiguring scars for the rest of their lives. There is not the [803] injurious fact that would justify that kind of ratio of punitive to compensatory. So I think even under the more recent line of authorities regarding the rational relationship rule that this verdict fails that test and under our recent Supreme Court holdings would fully justify setting aside the award and granting us a new trial in this case.

Finally, Your Honor, I think we saw briefed here the Constitutional issue in the damage award and I'm sure

the Court's aware that it has drawn a whole lot of law review commentary and also publications of recent vintage, but I think again that the award in this case, in given the Wells standard and general punitive damage instruction given in this case, the jury was left to their own devices without any yardstick as to what was a reasonable punitive damage award. And for that reason, a vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award, in essence, would cause the Court or should cause the Court to set it aside on Constitutional grounds.

The traditional test could serve as a basis for setting aside the puntive damage award. Wells v. Smith standard would certainly, in our opinion, serve as a basis for setting aside the award in this case, without reaching a Constitutional issue, but even if it doesn't because of the vagueness of that standard, that clearly under Constitutional principles that it would justify [804] in this case. You will note as recited in the Georgia case, a recent 1988 case, Covalina Pipeline versus Brown, in which the Supreme Court in Georgia was faced with this issue held that regardless of the United States Supreme Court's application or lack of application to the excessive fines clause in civil cases that under the state Constitution they would hold an excessive fine clause did apply to the state proceedings and therefore was an unconstitutional denial of process or—Excuse me. They didn't reach the process on the excessive fines clause. They set aside the award in that case.

THE COURT: West Virginia hasn't had the opportunity to decide that yet, have they?

MR. MILLER: I don't believe they have, Your Honor.

The Georgia case we did not cite here—maybe we should have put it in the citation—was appealed to the United States Supreme Court on a discretionary writ and they did deny to take the case and for that reason, the holding of that case stands, but for Constitutional rules

a state court has the authority to set aside a punitive damage award as violative of the excessive fines clause.

The due process argument, I think, is briefed from the stand-point that in Bankers Life several members of the Supreme Court in a concurring opinion did indicate that punitive damage awards or excessive punitive damage awards under instructions and case law [805] similar to our state's does or could certainly violate that fundamental fairness standpoint of due process and would justify the Supreme Court taking a look at it on a Constitutional basis. I would think in this case in the Browning Farris case, they did not reach the due process because it was not raised in the post-trial motions and trial stage. We're doing that here, so I see nothing from the existing status of the U.S. Supreme Court cases that would prohibit this Court from overturning this award as grossly excessive and unconstitutional.

We're prepared to argue at length, if you would like, many of these issues, but I think since we did submit a rather lengthy brief with citations to the Court in support of our position, we appreciate the Court's taking the time to review our brief that we submitted in this matter, but I don't think I can stress strongly enough, Your Honor, but we've searched high and low and can't find anything under similar factual circumstances that could justify punitive damages award like this. It should be set aside.

One case we did not discuss in the brief but I want to raise because Mr. Watson did raise it during pre-trial motion stage. They relied upon a slander of title case, Summa Corporation v. Greenspun, a 1983 case in which a one million dollar punitive damage award was upheld in a slander of title cause of action. And that was considered on appeal on the basis of its [806] gross excess, etc. We would argue that that case gives no justification for an award in this case. First of all, the facts of that case show that Summa Corporation was owned by and controlled by the famous Howard Hughes and that he

had used that corporation for personal vindictive reasons to get at a party in that case and used the board of directors in that case to record a deed of trust to tie up property when he had entered into a contract with a party not to do so. And that the facts of that case showed such a clear and egregious intentional effort to tie up the property for the purpose of getting at the plaintiff in that case that justified the—The Nevada Supreme Court held it justified the award in the case.

I think that was cited by Mr. Watson as a good lawyer, certainly, because that was a large award and probably the largest that could be found and yet it pales in comparison to the award in this case.

THE COURT: What could be more egregious than the vice president of a company saying, well, testifying and saying that he knew all along that this property belonged to Tug Fork? I forget his name, but it was—

MR. WATSON: Michael Good.

THE COURT: Who?

MR. WATSON: Michael Good.

THE COURT: Michael Good—testified on the stand, he says, [807] I didn't think that title report was right that Mr. Skeen—Said, I knew all along that it was wrong.

MR. MILLER: I don't believe that was quite his testimony.

THE COURT: Well, I'm paraphrasing. I'm certainly not—The record will speak for itself. I'm certainly paraphrasing, but I think that's what I got from that and not only did I get that from that testimony, I think the jury did, too.

MR. MILLER: Well, in connection with Mr. Good's testimony, if I can paraphrase it—

THE COURT: Sure.

MR. MILLER: —as I recall it. His testimony basically was that he reviewed the lease, he wasn't a lawyer, he looked about it, he couldn't state for certain one way or the other a hundred percent that it was or was not proper title. He didn't think there was a cloud on title,

but his outside counsel, Mr. Skeen, had written a title opinion letter in which he said there was a cloud on title. And under their contract and the company policy procedures, they could not proceed to drill the well unless and until outside counsel had approved title. And he, not being a lawyer, decided to follow the advice of his counsel. And his counsel said that those acts of taking the quit claim deed, etc. were necessary to clear title, then he approved that, upon the advice of outside counsel, as well as inhouse counsel, we would believe that under those facts it's not the same as the Summa [808] case.

THE COURT: I think he definitely said he wasn't a lawyer, but he said he had done a lot of these things in the capacity of his position. A number of them. He was the head man, wasn't he?

MR. MILLER: That's correct. He was the head of the Charleston office.

THE COURT: So— And I'm certainly not going to try to debate with you what he said. I mean, you heard it one way and I heard it another and the record, quite frankly, will speak for itself on that, but probably what you should do now in the interest of time is go on and get into your remittitur motion and then I'll give them an opportunity to respond. Okay? Or had you finished with the other?

MR. MILLER: No. I was going to address that subject, but I'll just do it all at once.

THE COURT: I wish you would.

MR. MILLER: And our second alternative, Your Honor, that we have cited to you a fact in a case that I'm sure everybody in this room is familiar with, Robert v. Stevens Clinic, in which our Supreme Court did order a remittitur. The same standard, basically, was employed in that case in trying to determine what was an excessive award. And I think it's clear in that case certainly the loss sustained by the plaintiffs, a two year old [809] infant, being a loss to a family memeber—the family of a mother and father and sisters or brothers. Under the

underlying facts of what caused the death in that case, clearly could have evoked certain amount of passion and sympathy that this case does not justify. The Supreme Court, in that case, felt that twelve million dollars was grossly excessive, remitted that award—

THE COURT: It was ten million, wasn't it?

MR. MILLER: I'm sorry. Ten million dollars and remitted it to three million, as I recall, Your Honor, and I think in that case a personal injury under the traditional test of what's excessive, the personal injury offsets the question of the ratio and justifies a higher ratio. In this case, we don't have the personal injury or loss of a family member and regardless of whether, what TXO did was right or wrong, in my view, the jury held it wasn't wrong and awarded punitive damages, nevertheless, that was grossly excessive in light of the Supreme Court's holding in the Roberts case. That's the only case, I think, that really is of recent vintage that's helpful in deciding a remittitur. I think, however, that the Wells case and the Leach case, particularly the Leach case, do give guidance to the Court in determining what is excessive and we have already argued that point to you.

I guess as our second alternative should the Court decide not to set aside the award and grant a new trial in this case [810] that the trial court should, nevertheless, under the standards of Leach, Wells and Roberts v. Stevens Clinic, clearly remit an award to a reasonable portion under the analysis of the Supreme Court.

That will conclude my remarks on that, Your Honor, and the other motion that we filed was, I guess, almost a third alternative motion and typically I would have filed it after your ruling on this matter, but I saw that Mr. Brumfield had filed his motion to compel surety and thought that to save time I'd go ahead and get this one on the record in the event that you deny our post-trial motions, Your Honor, we obviously wanted to let the Court know that we would like through Rule 62 and Rule 6 of the appellate rules a motion for stay, which I think would clearly be appropriate for us to take up the issue

of the appeal and we would promptly expect to do so. For that reason, I move under the revised rules where we get a four month appeal period, I think that the Court could clearly under those rules, should stay any portion of the judgments while we pursue the appeal.

Thank you, Your Honor.

THE COURT: Thank you. Who will respond?

Don't fight each other. One of you just stand up and start talking.

MR. BRUMFIELD: Your Honor, let me address the punitive—

THE COURT: Or both of you. I'll let both of you say something. That's all right.

[811] MR. BRUMFIELD: To go to the punitive damage argument, Your Honor, the passion part of it, I think the jury— I don't recall, but I think it was around a four hour deliberation. There was fraud, slander of title shown, as the Court's already enunciated at the highest level, highest corporate level. He made just now reference while he was head of the Charleston office, but what he was, was— Two things are important. One, he was vice president, executive vice president, of this particular corporation, TXO Production Corp., and he also was an officer of the parent corporation, TXO, in fact testified he was an employee that they now— And that laps over the other objection. He was an employee of Texas Oil and Gas Corp., as was most of the witnesses who actually did the acts complained of on a county and statewide level, represented themselves to be employees of TXO Production Corp., testified, however, that they were only assigned to the division by the parent corporation by whom they were employed.

Now, the jury saw what we saw, what we said. There was fraud and there was a contempt for not only the rights of the defendants, there was a contempt for this Court and a contempt for the whole judicial process. We caught their employees in misrepresentations. There were admissions on the stand, and, irrespective of that, they still were cavalier enough to refuse proper discovery, re-

fused to disclose any financial records. So [812] then, as the Court recalls, we did the best we could with the Ph.D., reconstructed their analysis, which we think is proper from two standpoints. One, because of waiver. They refused to give us their own records, refused to provide them to the Court or to counsel, so we reconstructed based upon public records, based upon what the testimony was was a proper way to evaluate it, and then having done that, it was proper also in this case because the acts were approved by the parent corporation anyway.

Secondly, at that point in time, TXO Production Corp. could have come in and offered some rebuttal testimony if they thought that the analysis of 1.5 to two billion dollars of assets and net worth was off base, but, no, they didn't. That was the evidence the jury heard, and the only evidence. So you had waiver again. He's— TXO certainly had an opportunity to have offered rebuttal testimony and chose not to. I think that the evidence clearly is, then, that our evidence as proper—the evaluation of the corporation and the division. As far as proportionality, because of this argument, well, we had evidence from the State Department of Energy employee, plus one of our clients, Brian Robinson, who is an expert in the industry, concerning the fact that there were permanent damages to this property, not temporary, that the damages could be considered as high as $800,000.00. Now, rather than get into that on closing argument, since they had evidence of their own experts that, no, [813] they're not that high, what we did, we just basically didn't argue that. Because we had uncontradicted damages. They acknowledged the fact that the compensatory damages the jury returned, there was no question about. And so— I only want to mention that from the standpoint that the jury could have, if they had wanted, come out here with a verdict of $800,000.00 compensatory and $10,000,000.00 punitive and maybe they took that in consideration in arriving at the punitive, but there was evidence. We just didn't argue at the closing because here was a contest between the parties as to that, but not as to the other issues.

The Constitutionality of, that they raise now, I believe they've waived that. The only Constitutional argument raised by TXO Production Corp. heretofore was the First Amendment argument. They said, if you recall, they said that they didn't, that the Court can't impose a limitation on their right to slander title. They have a right to say what they want under the First Amendment privilege. The only Constitutional argument heretofore raised prior to the verdict wasn't raised when we were arguing the instructions and it wasn't, hasn't been heretofore raised and I think it's waived. Secondly, concerning the allegations that they now raise, these are the same type arguments that were raised in Crinshaw v. Ford, 174 Cal. Rep. 348 to 81. That's the case where the Pinto fire, the rear end explosion case. Evidence that Ford makes, could have prevented for $11.00. They just made a cost analysis. We don't want to. We're gonna have [814] 180 people incinerated. We'll pay off those 180 people, we'll still make more money than, to build the cars cheaper. In this case, there was a reason. We proved, no question about it, they knew exactly what they were doing. As the Court's already pointed out, they knew what they did was wrong, they didn't care, they didn't think they'd get caught. If they got caught, they wouldn't get caught this bad. And that's why jury verdicts, subject to the Court's protection of excessiveness, is fair and reasonable. It's not a denial of due process. There's no disproportionality taking all the circumstances because of the size of this mega-conglomerate and we only evaluated this particular division of USX.

Jury discretion and lack of some predictability is actually well served. If TXO, like Ford, had been able to go back and say, well, the worst we can get hit in McDowell County, West Virginia, is x number of dollars. Go ahead and steal the property. Just like the, Ford did in the Crinshaw case. Let's go ahead, don't put $11.00 to build a fire wall. We'll incinerate 180 people a year, we'll still pay them off, it'll still be cheaper than spending the

money. Some— There has to be some predictability. As far as the excessiveness. How could it be excessive? If Your Honor recalls, and I'm sure you do, you directed us the morning of trial to enter into settlement negotiations before you started you asked us, Mr. Miller, I [815] remember, popped up and, I said, no, Your Honor, it couldn't be, and he popped up and made some statement, yeah, they want ten million dollars. And I said, yes, they offered twenty-five, and I said— I said— No, pardon me. They said they wanted five million dollars. And I said they'd settle for twenty-five and I also told the Court at that time that I told Mr. Miller that I would not be surprised— I recognized that we could lose the case and they could win it. The uncertainty of a jury. But I also told Mr. Miller, and I told the Court that morning, I believe, that I would not be surprised if the jury returned a verdict in the range of 12 to 15 million dollars. Well, what it turns out was, we were right— His response at that time was, well, our people say if you want that, you sue us and try to collect it. My response, I think I told the Court, it was okay, we'll do that. Now— Now, they cry foul.

That's all I have, Your Honor.

THE COURT: You may respond. You've got two minutes.

MR. MILLER: Thank you, Your Honor.

Your Honor, first of all, regarding the settlement discussion in this case, you will recall that I got in this case rather late, right before trial. I don't know what discussions took place before that time, so I'm not going to make reference and tell you on the record what happened.

THE COURT: You remember what I did, don't you? [816] MR. MILLER: On the morning of trial when we were in your chambers, you directed us to discuss settlement. I will represent apparently from my standpoint that we entered into those discussions, we were faced with special damages or specials that would be put on the blackboard of $19,000.00. We made a $25,000.00 offer at that point. I had my client with me and was prepared to dis-

cuss more than that if we could get in the same ballpark. I was told, unequivocably, that unless you are going to pay us five million dollars today, there's no need to discuss this any further. And as I did tell Mr. Brumfield, my client will not agree with a five million dollar settlement, we're gonna have to go to trial, which we did. We were not in the same ballpark, obviously, on that.

Now, as far as the argument about broad mispresentation—

THE COURT: They could have saved five million if they had settled.

MR. MILLER: That's one way to look at it, Your Honor. That's true.

Regarding the allegations of fraud and misrepresentation and piercing the corporate veil, those arguments, let me point out, Your Honor, it's a slander of title cause of action, not a fraud or misrepresentation action. Secondly, on piercing and the actions of Texas Oil and Gas, they were not made a party to this proceeding and a motion was filed in that regard. Nor was [817] there any allegation or motion to do that. For that reason, we all think it was proper. Nor was that the reason offered at trial for allowing in the consolidated financial statements.

Your Honor, as far as the Constitutional argument whether there was a waiver or not, I don't believe a waiver would apply in the case. The Supreme Court's indicated that a appropriate stage to raise it would be in post-trial motions, but absent that, the Supreme Court will not review it and the Bankers Life case, we have raised it in a timely basis here.

Thank you, Your Honor.

THE COURT: All right.

Now, I'll hear from you on your motion for the bond. Are you withdrawing that motion?

MR. BRUMFIELD: No, Your Honor. We would move— We have no problem with the stay of execution, but that's separate and apart from our request for a bond. There was evidence given at trial and there's documented evidence that were filed as exhibits with our mo-

tion of USX's attempt to sell the assets of this particular corporation, deplete it. They now, since the trial, have actually announced to the SEC and to those on Wall Street that they've restructured and now it's a part of the division of Marathon. We believe this is sufficient for the Court to protect the rights of the four defendants in this case that have obtained the verdict and require TXO, in this case we'd [818] be satisfied if the bond would be signed off by USX or Marathon, but one of those two, Texas Oil and Gas really no longer, is not even— TXO Production Corp., as I read their, the exhibits we filed, it's not even part of that now. They've restructured that. They've sold off most of TXO Production Corp.'s assets. They attempted to sell all of them. So we ask that the Court require a bond—

THE COURT: I'm prepared to rule now.

As to the motion for judgment notwithstanding the verdict or in the alternative motion for a new trial, will be denied and overruled.

Motion for remittitur is denied and the defendant will post a surety bond equal to the amount of the judgment herein, including any interest.

Prepare an order accordingly and show the objection and exception of the parties. And your stay is granted, Mr. Miller, to give you time to appeal.

MR. MILLER: Thank you, Your Honor.

Thereupon the proceeding were concluded on this date.

APPENDIX D

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action No: 85-C-550

TXO PRODUCTION CORP., a Delaware Corporation
Licensed to do Business in West Virginia,
Plaintiff,

vs:

ALLIANCE RESOURCES CORP., a Texas Corporation Licensed to do Business in West Virginia; TUG FORK LAND COMPANY, a West Virginia Corporation; GEORGE KING, an Individual, and GROVER C. GOODE, an Individual,
Defendants.

ORDER

On the 20th day of September, 1990, came the parties, by counsel, pursuant to plaintiff's written Motion To Set Aside the Judgment Notwithstanding the Verdict, or in the Alternative Motion for a New Trial, or in the Second Alternative, Motion for Remittitur, plaintiff's Motion for a Stay of Execution on the Judgment Herein in the Event the Court Denies its Motions, and pursuant to the Motion of defendants to require plaintiff to post a surety bond on the judgment herein.

Whereupon, the Court proceeded to hear arguments of counsel on all of the above Motions and after considering the same, the written Motions of the parties, and memoranda in support thereof, the Court doth overrule the Motion of plaintiff to Set Aside the Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion for a Remittitur. It is, accordingly, AD-

JUDGED and ORDERED that the Motion of plaintiff, TXO Production Corp., for Judgment Notwithstanding the Verdict, Motion for a New Trial, and Motion for Remittitur, be and the same are hereby denied.

The Court doth sustain plaintiff's Motion to Stay Execution upon the verdict pending prosecution of plaintiff's Petition for Appeal herein. It is, accordingly, ORDERED, subject to plaintiff posting surety as hereinafter provided, that defendants are enjoined from executing upon the judgment rendered herein in favor of defendants and against plaintiff during the pendency of the time which plaintiff may, pursuant to law, petition the West Virginia Supreme Court of Appeals for appeal.

The Court doth sustain defendants' Motion to require plaintiff to post surety during the prosecution of an appeal herein. It is, accordingly, ORDERED that plaintiff post surety sufficient to cover the amount of the jury verdict, judgment thereon, plus interest on the verdict.

ENTER this 28th day of September, 1990.

/s/ Booker S. Stephens
Judge

APPROVED:

/s/ Timothy M. Miller
Counsel for Plaintiff

/s/ G. David Braunfield

/s/ Wade T. Watson
Counsel for Defendants

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of June, 1992, the following order was made and entered:

No. 20281

TXO PRODUCTION CORPORATION, a Delaware corporation licensed to do business in West Virginia,
Plaintiff Below,
Appellant

vs.

ALLIANCE RESOURCES CORPORATION, a Texas corporation licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,
Defendants Below,
Appellees

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, along with the brief Amicus Curiae tendered by the West Virginia Chamber of Commerce, filed on the 22nd day of June, 1992, in support thereof, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ [illegible]
Clerk
Supreme Court of Appeals

Supreme Court, U.S.
FILED
OCT 19 1992
OFFICE OF THE CLERK

No. 92-479

In The

Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP.,
THE TUG FORK LAND COMPANY GEORGE KING,
and GROVER C. GOODE,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether TXO waived its right of review under the factors set forth by the West Virginia Supreme Court of Appeals in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991) by its failure to address the *Garnes* factors on appeal.

2. Whether TXO sufficiently presents a retroactivity question before this Court under *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991) when TXO failed to rely upon *James Beam* before the West Virginia Supreme Court of Appeals.

3. Notwithstanding TXO's failure to address the procedural factors required by the West Virginia Supreme Court of Appeals in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991) and to raise the retroactivity question presented in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), TXO received the benefits of sufficient procedural and substantive review to satisfy due process.

4. Whether the award of punitive damages against TXO by the jury in accordance with West Virginia procedures limiting jury and judicial discretion, considering the gravity of the wrong, the need to punish, and the need to deter similar wrongful conduct, afforded TXO procedural and substantive due process under the Fourteenth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.1 of the Rules of this Court, respondents Alliance Resources Corp., and Tug Fork Land Company have no parent, subsidiary or affiliated corporations or companies. George King and Grover C. Goode are individuals.

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No. 92-479

In The

Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP.,
THE TUG FORK LAND COMPANY GEORGE KING,
and GROVER C. GOODE,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents Alliance Resources Corp., Tug Fork Land Company, George King, and Grover Goode respectfully request that this Court deny the petition for writ of certiorari, seeking review of the West Virginia Supreme Court of Appeals' opinion in this case. That opinion is reported at 419 S.E.2d 870 (W.Va. 1992).

STATEMENT OF FACTS

TXO's Statement of Facts is incomplete. The West Virginia court found TXO guilty of a "pattern of fraud, trickery and deceit." 419 S.E.2d at 890. Respondents incorporate the court's statement of facts found in the Opinion of the West Virginia Supreme Court of Appeals. 419 S.E.2d 870 (W.Va. 1992), Section I of the Opinion, pages 875-877. The court's statement of facts of the case may also be found in TXO's Petition for Writ of Certiorari, Appendix A, pp. 7a-12a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Any consideration of retroactivity of *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W.Va. 1991) was waived by TXO because it refused, until its petition for rehearing, to rely upon the procedural guidelines afforded by the state court in *Garnes*.

Following this Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991) the West Virginia Supreme Court of Appeals set forth in *Garnes v. Fleming Landfill*, supra, procedural factors to consider in reviewing punitive damages awards. Additionally, in *Garnes*, the West Virginia Supreme Court required that parties, upon appeal, "must address each and every factor set forth in Syllabus Points 4 and 5 . . . with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." 413 S.E.2d at 910.

TXO refused to do so, "for the very simple reason that evidence without proper jury instructions will not meet the requirements of *Fleming*." (*See*, Respondents' Appendix A, infra.) Therefore, TXO waived any error relating to procedural due process as set out in *Garnes* by the high court of West Virginia.

II. TXO failed to raise the issue below of whether *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991) accorded it retroactive due process rights.

In its petition to this Court, TXO now contends, for the first time, *James Beam* is applicable to this case and required the West Virginia Supreme Court of Appeals to apply retroactively *Garnes* and *Haslip*. However, this issue was never raised in the state court. Citation to *James Beam* appears nowhere in the record, briefs, or decision below. TXO could have raised the issue in its appeal, and certainly was required to have done so in its petition for rehearing, which was summarily denied by the West Virginia Supreme Court of Appeals. *See*, TXO App., 77a. Therefore, the retroactivity argument TXO now attempts to raise was "not pressed or passed upon" below. 28 U.S.C. §1257; *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 65 S.Ct. 573, 89 L.Ed. 812 (1945); *Crowell v. Randell*, 10 Pet. 368, 9 L.Ed. 458 (1836); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940).

III. Notwithstanding TXO's failure to rely upon it below, *James Beam* is inapposite for two reasons:

A. *Haslip* did not create new federal law or procedure;

B. The decision of the West Virginia Supreme Court of Appeals in *Garnes* was limited to state procedural factors relative to punitive damages.

A. *Haslip did not create new federal law or procedure:* Relying upon the Commerce Clause of the United States Constitution, this Court in *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) was concerned about discrimination by states in exercise of their taxing authority. *Bacchus* held states could not discriminate against imported as opposed to local alcoholic products. *James Beam* held the new federal rule created in *Bacchus* must be applied retroactively. Thus, *James Beam* is inapposite to the facts of this case because *Haslip* did not create new federal law. Accepting the historic common law method of assessing punitive damages, 111 S.Ct. at 1043, "as long as the discretion is exercised within reasonable constraints" 111 S.Ct. 1044, *Haslip* merely held the Fourteenth Amendment applies to punitive damages. *Haslip* created no new federal law or procedure. The Court said these historic procedures accorded due process. Therefore, *James Beam* is not pertinent to the review of punitive damages.

B. *The decision of the West Virginia Supreme Court of Appeals in Garnes was limited to state procedural factors relative to punitive damages:* TXO asserts the West Virginia court "announced new procedural guidelines to bring

West Virginia's punitive damages scheme into compliance with federal law." TXO Petition for Certiorari, p. 18. After having created this alleged new constitutional right in *Garnes,* TXO further contends the court denied it such rights in this instance. Finally, TXO now contends this Court should grant its petition for certiorari under the auspices of *James Beam* and that this Court require a state court to apply its own state procedural guidelines retroactively.

The West Virginia court in *Garnes* did not create a new federal constitutional right. The court merely "set out a new system for the review of punitive damages awards in West Virginia." 413 S.E.2d at 908. This Court in *Browning-Ferris v. Kelco Disposal,* 492 U.S. 257, 278, 109 S.Ct. 2922, 106 L.Ed.2d 219, 240 (1989) stated, "where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *See, also, Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc.,* 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941). The West Virginia Supreme Court of Appeals in *Bradley v. Appalachian Power Co.,* 256 S.E.2d 879, 887 (1979) said, quoting Justice Cardozo in *Great Northern Railway v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360, 366 (1932):

> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later

> overruled, are law none the less for intermediate transactions. . . .

Justice Kennedy, in his concurrence in *Haslip*, noted this Court does "not have the authority, as do judges in some of the states, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination." 111 S.Ct. at 1056. Therefore, the West Virginia Supreme Court of Appeals' procedure, under the facts of this case, does not raise substantial federal issues.

IV. There is no reason for this Court to revisit the punitive damages issue in light of the Fourteenth Amendment only one year after deciding *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

This Court, in *Haslip*, held the historic "common-law method of assessing punitive damages is not so inherently unfair as to deny due process. . . . ," 111 S.Ct. at 1043, where the jury's discretion is not unlimited followed by reasonable trial and appellate court review. The Court specifically rejected the same argument TXO makes in this case – that the verdict be held an unconstitutional denial of due process based on the disparity between compensatory and punitive damages. This Court wisely recognized that "under the law of most States, punitive damages are imposed for the purposes of retribution and deterrence. . . . " 111 S.Ct. at 1044. Recognizing that to set a fixed ratio between compensatory and punitive damages would defeat the social goals of punitive damages

and result in innumerable injustices, Justice Blackmun, speaking for the majority said:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

111 S.Ct. at 1043.

Contrary to the representation of TXO, Petition, p. 7, the Court did not mandate state or federal courts adopt any specific procedures, including Alabama's, regarding jury instructions, post-trial or appellate review. In fact, Justice Scalia noted that, historically, "no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages or their amount." 111 S.Ct. at 1048. Similarly, Justice Kennedy was concerned that rules of "certain and specific content" may have an effect of yielding "uniformity at the expense of considerations of fairness in the particular case. . . . These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity." 111 S.Ct. at 1055.

State and federal courts are now reviewing cases in light of the guidance of *Haslip* and, where appropriate, are applying additional procedural safeguards. See citations infra, pp. 9-10. The time is not ripe for this Court to revisit due process of punitive damage award procedures of another jurisdiction.

V. Notwithstanding TXO's failure to rely upon the procedures of *Garnes* below until its petition for rehearing, the West Virginia Supreme Court of Appeals reviewed the punitive damages award in accordance with the guidelines of *Garnes* and *Haslip*, and found the verdict supported by the evidence and in accordance with state law.

In its petition for certiorari, TXO contended it did not receive due process protection, alleging inadequate jury instructions, post-trial and appellate review below. TXO's representation is inaccurate. There is no substantial federal issue as to whether TXO was accorded due process protection by the West Virginia state courts.

In this instance, TXO received due process of law protection. In fact, the instructions received by the jury below were at least as constraining as those received in *Haslip*, 111 S.Ct. 1037, n.1. (*See*, Respondents' Appendix B, containing Instruction 6A given to the jury.)

TXO was not denied due process in the post-trial review. Although the trial court did not make written findings of fact specifically addressing the factors used in Alabama, it did review all of the contentions made by TXO's counsel in its motion to set aside the verdict or, in the alternative, remit a portion of the punitive damages award. The record of the post-trial hearing on TXO's motion reflects that the trial judge "read everything you sent down here," referring to TXO's post-trial brief consisting of "45 pages in length." (TXO, App. 56a-57a). Furthermore, the record reflects that many of the issues were briefed and ruled upon by the court at the pretrial stage. (TXO, App. 56a). During the post-trial hearing, the

trial court pointed to the reprehensibility of TXO's fraudulent conduct:

> What could be more egregious than the vice president of a company saying, well, testifying and saying that he knew all along that this property belonged to Tug Fork?
>
> (TXO, App. 66a)

Therefore, even though this case was tried before the West Virginia Supreme Court announced factors for the trial court to consider during post-trial review of punitive damages awards, the trial court in this case considered multiple *Garnes* factors such as the reprehensibility of TXO's intentional misconduct, the likelihood of grievous harm, and the reasonableness of the amount in view of TXO's substantial net worth.

The fact that the trial court did not set forth on the record its reasons for denying TXO's post-trial motions was not held by the West Virginia appellate court to deprive TXO of due process. 419 S.E.2d at 875. Similarly, most other courts which have considered what due process requires under the guidelines of *Haslip* have held Alabama's procedure is not the only procedure that satisfies due process. *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991) *cert. denied*, 112 S.Ct. 2439 (1991), ("The Texas scheme differs in at least two respects from the Alabama procedure. Texas trial courts are not required to justify their review of punitive damage awards in the record."); *Hess Oil Virgin Island Corp. v. HOVIC, Amerada Hess Corp.*, ___ F.2d ___, 1992 WL 228875 (3rd Cir. September 19, 1992) (" . . . federal post-trial review under Rules 50 and 59 and federal appellate

review of a jury award provide sufficient constraint on a jury's discretion to satisfy the requirements of due process.") *Morgan v. Woessner*, ___ F.2d ___, 1992 WL 220237 (9th Cir. September 15, 1992) (The federal court's review of punitive damages awards, under 42 U.S.C. §1983 satisfied due process.); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991) ("As long as there is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis in *Haslip*."); *Las Palmas Assoc. v. Las Palmas Center*, 1 Cal.Rptr.2d 301 (Cal. App. 2 Dist. 1991); *MGW, Inc. v. Fredricks Development Corp.*, 6 Cal.Rptr.2d 888 (Cal. App. 4 Dist. 1992); *Wollersheim v. Church of Scientology*, 6 Cal.Rptr.2d 532 (Cal. App. 2 Dist. 1992); *Hilgedick v. Koehring Finance Corp.*, 8 Cal.Rptr.2d 76 (Cal. App. 1 Dist. 1992).

Additionally, during its appellate review of this case, the West Virginia Supreme Court said it would be "especially diligent in our review of any punitive damages awards entered before *Garnes* was decided." 419 S.E.2d at 886. In conducting this comprehensive review, the court referred to *Garnes* a total of twenty-two times and to *Haslip* a total of eight times. The court said:

> In applying the *Garnes* "reasonable relationship" test to the case before us, we look to: (1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future. The type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit.

419 S.E.2d at 889-890.

The court also considered and approved the trial judge admitting into evidence the net worth of TXO Division of USX, which is between $2.2 and $2.5 billion, 419 S.E.2d at 890, and evidence of other similar bads acts by TXO. 419 S.E.2d 883-86.

In reviewing this case under all the *Garnes* factors, the court looked to TXO's net worth to determine if the punitive damages were reasonable or excessive, just as the jury and trial court had earlier done. The punitive damages represent less than one-half of one percent of the worth of the TXO Division. A number of other courts have looked to the worth of the perpetrator in answering reasonableness of punitive damages. *Hess Oil Virgin Island Corp. v. HOVIC, Amerada Hess Corp.*, ___ F.2d ___, 1992 WL 228875 (3rd Cir. Virgin Islands, September 19, 1992); *Morgan v. Woessner*, ___ F.2d ___, 1992 WL 220237 (9th Cir. Cal., September 25, 1992); *Price v. Highland Community Bk.*, 932 F.2d 601 (7th Cir. 1991); *Eichenseer v. Reserve Life Ins. Co.*, supra; *Cash v. Beltmans North America Co., Inc.*, 900 F.2d 107, n.3 (7th Cir. 1990) ("typical ratio for a punitive damage award to a defendant's net worth may

be around one percent."); *Viking Ins. Co. of Wisc. v. Jester*, 310 Ark. 317, ___ S.W.2d ___, 1992 WL 167469 (Ark. 1992).

As part of its review of this award, the West Virginia court also made a detailed comparative analysis of verdicts from other jurisdictions based upon conduct of the defendant, compensatory and punitive damages. The comparison revealed several other instances where courts found the evidence warranted punitive damages verdicts which also represented large disparities between compensatory and punitive damages. In *TXO*, the court made specific reference to *Principal Financial Group v. Thomas*, 585 So.2d 816 (Ala. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 649, 116 L.Ed.2d 666 (1991) (750:1 ratio); *Eichenseer v. Reserve Life Ins. Co.*, supra, (500:1 ratio); and *Hospital Authority of Gwinnett Co. v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991), *cert. denied*, 112 S.Ct. 1176 (1992) (260:1 ratio). TXO, 419 S.E.2d 888-89; 894-95. Like West Virginia's court did in this instance, other courts have made comparative analyses with other punitive damages verdicts. *Hess Oil Virgin Island Corp. v. HOVIC, Amerada Hess Corp.*, supra; *General Motors v. Johnston*, 592 So.2d 1054 (Ala. 1992); *Hilgedick v. Koehring Finance Corp.*, 8 Cal.Rptr.2d 76 (Cal. App. 1 Dist. 1992); *Wollersheim v. Church of Scientology*, 6 Cal.Rptr.2d 532 (Cal. App. 2 Dist. 1992).

After having been "especially diligent in our review," 419 S.E.2d 886, West Virginia's highest court found no error by the trial court, concluded the verdict was correct, and affirmed. TXO alleges this, too, was a denial of due process, contending the appellate court should have remanded this case to the trial court, as it had earlier in *Garnes*. However, both cases stand on their own facts, and both are quite different. *Garnes* was reversed and

remanded by the West Virginia Supreme Court because it overruled prior case law "to the extent that it stands for the proposition that a jury may return an award for punitive damages without finding *any* compensatory damages." 413 S.E.2d 908. Since the jury in *Garnes* awarded no compensatory damages, a new trial was indicated. In the instant case, the jury returned a compensatory damages verdict. Therefore, there was no reason for the appellate court to remand this case to the trial court, as had been necessary in *Garnes*. The appellate court found the trial court's conduct of the trial and the post-trial review were adequate and the verdict was not excessive.

TXO also alleges *Garnes* required the court to have remanded this case for a new trial because the jury was not instructed punitive damages should bear a reasonable relationship to compensatory damages. However, TXO omits an important exception stated in *Garnes*. In *Garnes*, the court said "where the actual harm was minimal but the potential harm was tremendous, a jury may reasonably find punitive damages commensurate with the potential harm." 413 S.E.2d at 908. The appellate court found this exception applied under the facts of the instant case. The court specifically rejected TXO's argument that it should draw a mathematical bright line between compensatory and punitive damages. To do so would limit the state's ability to use punitive damages to control socially unacceptable misconduct in some cases. The court said:

> Just as we recognized in *Garnes* that there can be no mathematical bright line relationship between punitive damages and compensatory

> damages, we cannot simply examine these nine criteria seriatim, awarding a certain number of points to each. The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards.

419 S.E.2d at 887.

The court went on to label TXO's conduct as "mean," as opposed to "stupid," citing examples of each as justification for the larger award. The court said, "[a]ccordingly, we find that in cases where the defendant has intentionally committed mean-spirited and harmful acts (especially when the provable compensatory damages are small, but the potential of harm is great), even punitive damage 500 times greater than compensatory damages are not per se unconstitutional under *Haslip* and *Garnes*." 419 S.E.2d at 889.

TXO contends the West Virginia court's use of "mean/stupid" conduct is void for vagueness. However, the majority explained its analysis. This Court, in *Haslip*, rejected a similar void for vagueness argument. 111 S.Ct. 1046, n.12. This argument likewise raises no substantial issue for this Court.

In summary, in spite of TXO's own failures to raise issues below, it received all the protection of due process to which it is entitled. The review given to the verdict against TXO below is greater than accorded most wrongdoers. TXO may complain about the result, but it has no constitutional basis for this Court to grant its petition for writ of certiorari. As stated, the jury was reasonably constrained and the trial court's review was adequate, as

the appellate court so found. Furthermore, the court conducted a complete review and considered all the *Garnes* procedural guides. That additional protection assured TXO of due process. *MGW, Inc. v. Fredricks*, supra.

VI. The judgment of the West Virginia Supreme Court of Appeals should not be reversed or remanded under the doctrine of harmless error.

Even assuming, *in arguendo*, this case should have been remanded by the State Supreme Court for whatever reason, considering the limiting nature of the jury instructions, the post-trial review, and the extensive review of the appellate court, any error is harmless and not a denial of due process. *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) (error in admitting coerced confession in capital case harmless); *Schad v. Arizona*, 111 S.Ct. 2491 (1991) (due process satisfied, although jury was not required to agree to which alternative charge of murder of which defendant was guilty.)

CONCLUSION

This Court should deny TXO's petition for writ of certiorari.

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October 19, 1992

APPENDIX A

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* * *

carefully explained to a jury. Syl. Pt. 3. Two of these factors are that punitive damages should bear (1) a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred, and (2) a reasonable relationship to compensatory damages. The jury in this case received no such instructions. See Defendant's (Appellees') Instruction No. 6A, Tr. 737.

The Appellees devote some 15 pages of their brief to sketching what they believe is the evidence in the record on the five mandatory factors (Syl. Pt. 3) and four discretionary factors (Syl. Pt. 4) set forth in *Fleming* which guide or may guide a jury in assessing the amount of punitive damages. Appellees' Brief, 54-69. TXO will not respond to the Appellees' sketched evidence for the very simple reason that evidence without proper jury instructions will not meet the requirements of *Fleming*.[10]

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[10] TXO also does not agree with appellees' statement of the evidence. For instance, the state at page 69 of their brief that "since the judgment below, TXO has offered $400,000.00 to settle this case." They fail to mention that after TXO made this initial offer, the appellees wrote and said they were not interested in discussing a settlement. They only agreed to meet with TXO after repeated requests. When the parties finally met, the appellees offered to "settle" for $11,300,000.00 and indicated no flexibility in that demand.

C. The punitive award of $10 million should be set aside because the trial court did not utilize the standards required by *Fleming* for review of the jury's award and thereby violated TXO's rights under the Due Process Clause.

Fleming establishes nine standards (those set forth in Syl. Pt. 3 are whereby a trial court is to review a punitive award. There is no evidence in record that the trial court utilized any standard in reviewing the award. If the

* * *

APPENDIX B

Instruction 6A Given To The Jury. Trial Transcript, Page 737.

* * *

In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

Leach v. Biscayne Oil and Gas Co., Inc., 289 S.E.2d 197

* * *

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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The bulk of respondents' brief in opposition consists of procedural arguments that are both factually and legally incorrect. These strawman arguments are raised in a transparent attempt to preclude this Court from reviewing issues of obvious substantive importance. As if their need to distort the record below and their reliance on flimsy arguments were not sufficiently revealing of the weakness of their position, respondents only barely address the several substantive arguments made by petitioner TXO Production Corp. ("TXO"). They make *no*

attempt to refute the existence of conflicts in both state and federal courts over what sort of post-trial review is required under the Fourteenth Amendment and *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), and over the appropriate size of punitive awards. Additionally, by their lack of discussion of the subject, they as much as concede that the punitive award here, 526 times larger than the compensatory award, was unconstitutionally disproportionate. In short, respondents simply present no reason for this Court to deny TXO's petition.

1. Respondents claim that TXO somehow waived the issue of the retroactivity of *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). This claim required respondents blatantly to misrepresent the record below, and is wholly without merit.

In order to "prove" that this argument has been waived, respondents focus solely, and somewhat desperately, on one sentence of TXO's *reply* brief. Respondents ignore TXO's opening brief on appeal to the West Virginia Supreme Court, where TXO discussed the fact that "the procedural requirements established in [*Garnes*] were not followed." Reply App.,[1] *infra*, at 1a-6a; see also *id.* at 4a (noting that TXO's post-trial motions concerning many of the *Garnes* factors were summarily denied from the bench).

Moreover—and importantly—TXO's argument was passed upon by the West Virginia Supreme Court. Pet. App. 32a ("The first issue that we must consider in this regard is the applicability of *Garnes* v. *Fleming Landfill*, —— W.Va. ——, 413 S.E.2d 897 (1991) to those cases still on appeal that were decided before we

[1] Attached as Appendix A to this reply brief is an excerpt of TXO's opening brief on appeal to the West Virginia Supreme Court. TXO has attached this excerpt to demonstrate that, contrary to respondents' assertions, TXO plainly presented full argument on the retroactivity of *Garnes* to the West Virginia court.

handed down our decision in *Garnes*"). It is well established that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959). Thus, the retroactivity issue was not only raised below, but also duly considered by the West Virginia Supreme Court. Respondents' argument is therefore wholly without merit.

2. As demonstrated above, TXO quite clearly argued that the West Virginia Supreme Court was required to apply *Garnes* retroactively, and, equally clearly, the West Virginia Supreme Court rejected that argument. Respondents nonetheless contend that TXO's citation of *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in support of that issue is somehow precluded.

Before the West Virginia Supreme Court, TXO argued that Due Process standards could be satisfied only by the application of the *Garnes* federal procedural requirements to this case. In response to this Due Process argument, the supreme court held that TXO's rights were outweighed by the burden of having to "send far too many cases back for retrial." Pet. App. 32a. Accordingly, the West Virginia Supreme Court directly rejected TXO's Fourteenth Amendment argument.

To bolster their position, respondents apparently seek to create of whole cloth a new procedural rule for this Court, that no authority may be cited in support of a previously raised argument unless that precise authority also was previously cited. Parties, however, "are not confined . . . to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). When a particular "constitutional premise" was raised below—and rejected by the court, as it clearly was here—petitioner is free to present to this Court a different "method of analysis readily available to the state court." *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972). TXO's

citation to *James Beam* as authority supporting its previously raised argument is thus entirely appropriate.

3. Contrary to respondents' urgings, *James Beam* should be found to apply to this state court decision because *Garnes* created a new, federally mandated procedure. As discussed by TXO in its petition, *James Beam* stands for the proposition that a federal court may not announce a new federal rule, yet decline to apply that rule to cases arising on facts predating the announcement of that rule. See Pet. 18. In *Garnes*, the West Virginia Supreme Court announced a new procedure for awarding punitive damages in that state, *mandated by the Federal Constitution*, and applied that new rule to the *Garnes* litigants. The court then declined to apply that rule to TXO, a case arising on facts predating the *Garnes* decision. Thus, the analogy to the *James Beam* rule is a precise one, and this Court should clarify that the *James Beam* holding applies equally to *state* court decisions announcing new federal rules.

Respondents answer the wrong question by discussing whether *Haslip* in fact "create[d] new federal law or procedure." Opp. 4. Rather, the question is whether *Garnes* created new, federally mandated procedure in West Virginia. It unquestionably did. The supreme court stated in *Garnes*, "Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia." 413 S.E.2d at 908. Indeed, in its opinion in this case, the court noted, "We set out these [*Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*, *supra*." Pet. App. 35a. Accord, *Hinerman* v. *The Daily Gazette Co.*, 1992 WL 166350, at *14 (W. Va. July 15, 1992). Therefore, the teaching of *Felder* v. *Casey*, 487 U.S. 131 (1988), that a "'federal right cannot be defeated by the forms of local practice,'" *id.* at 138 (citation omitted), mandates that the rule of *James Beam* be applied here, and retroactive effect be given to *Garnes*.

4. As set forth in TXO's petition, the results of over one and one-half years of interpretation of *Haslip* by the lower courts make clear that the time is ripe to clarify further the requirements of due process in the context of punitive damages. Respondents do not—and cannot—deny that conflicts and confusion are widespread among the lower courts. In its petition, TXO cited cases squarely conflicting with the trial court's summary approval of punitive damages (Pet. 9-11), as well as with the West Virginia Supreme Court's cavalier approval of the enormous punitive damages against TXO (Pet. 15-17). TXO also cited cases demonstrating that excessive punitive awards have been approved in both state and federal courts notwithstanding *Haslip* (Pet. 13 n.10), and cases in which state and federal courts have effectively given blanket endorsement to a wide variety of punitive damages schemes, often virtually devoid of the checks found in *Haslip* (Pet. 13 n.11). These extensive citations are not countered in any way by respondents, who conclusorily assert only that "[t]here is no reason for this Court to revisit the punitive damages issue . . . ." Opp. 6. On this, respondents are clearly wrong.

5. Respondents' suggestion that TXO was afforded all required procedural protections flies in the face of the facts and simple logic. The "general concerns of reasonableness and adequate guidance from the court" called for by *Haslip* have been utterly disregarded in this case. 111 S. Ct. at 1043. Plainly, the review afforded to TXO in no way came near either the multilevel review afforded in *Haslip* or the procedures mandated by and followed in *Garnes*. Here, the trial court conducted no recorded post-trial review whatever. On review, the supreme court then proceeded to supplant the detailed *Garnes* criteria with its new "really mean"/"really stupid" defendant test. That

standardless approach constitutes an abandonment [2] of the West Virginia court's earlier attempt to provide objective and principled criteria for application by *both* the trial court and the appellate court in reviewing punitive damages awards. The contrast between those criteria and the vague and subjective "really mean"/"really stupid" defendant test is stark; the result of the application of the latter "test" in this case is shocking.

6. Respondents argue that the lack of procedural safeguards afforded TXO constituted some kind of "harmless error." But this is nothing short of a wholesale rejection of the entire effort to place meaningful contraints on punitive awards through procedural means, an effort promoted by this Court in *Haslip*.

Moreover, respondents' argument ignores the stunning size of the $10 million in punitive damages, 526 times the compensatory damages,[3] that were awarded and cursorily approved in this case. Had the trial court conducted an independent and searching review, as required by *Garnes* and by the Alabama procedure reviewed by this Court in *Haslip*, it cannot be assumed that this excessive award would have been sanctioned. Likewise, this extreme award might well have been rejected if the West Virginia Supreme Court had itself undertaken a sober and methodical evaluation of the criteria it set forth in *Garnes*,

[2] At least one recent case demonstrates that the West Virginia Supreme Court intends to continue to apply its "really mean"/"really stupid" defendant test in evaluating punitive awards. In *Hinerman* v. *The Daily Gazette Co.*, the West Virginia court upheld punitive damages in a libel case, stating that "in this case far greater punitive damages could be sustained on appeal because the evidence indicates that the defendant moved from the 'really stupid' category discussed in *TXO* to the 'really mean' category." 1992 WL 166351, at *13-*14 (Neely, J.) (citing *TXO*).

[3] The disparity between the sizes of the punitive and compensatory awards also raises a substantive due process issue, which was addressed by TXO in its petition. Pet. 14-17. TXO's arguments have not been countered by respondents.

rather than relying principally on its determination that TXO's award was acceptable under the essentially unlimited "guideline" for "really mean" defendants. Certainly, had the award been reviewed in West Virginia's sister state of Maryland, it would not have passed muster. See *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991) (award 50 times the compensatory award unconstitutional under *Haslip*), *cert. denied*, 605 A.2d 137 (Md. 1992). Cf. also *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991) (remittitur required of $25 million punitive award, 2.77 times larger than compensatory award, because it was shocking and bore "no necessary relation to the actual harm caused"), *cert. denied*, 112 S. Ct. 1941 (1992).

CONCLUSION

For the foregoing reasons, and for the reasons stated in TXO's petition for a writ of certiorari, this Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

Pages 44-49 of Brief of Appellant TXO Production Corp. filed in the Supreme Court of Appeals of West Virginia (Dec. 16, 1991):

[44] The facts of the present case call for the application of the general rule stated in *Fleming Landfill* and a setting aside of the punitive damage award.

> 4. Even if the attorney fee award is considered as actual harm or compensatory damages, the punitive damage award is disproportionate, excessive and unconstitutional. In addition, the procedural requirements established in Fleming Landfill were not followed.

Syllabus points 3 and 4 of *Fleming Landfill* set forth the new standard for evaluating the excessiveness of punitive damage awards, as follows:

* * * *

> 3. When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions,

whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt [45] settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

4. When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will

make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

* * * *

[46] With respect to the analysis of syllabus point 3, the jury instructions relative to damages do not meet the test.

The only instruction given the jury regarding punitive damages was Defendant's Instruction No. 6A:

In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such pun-

ishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of the large means than it would upon one of ordinary means under the same or similar circumstances.

Leach v. Biscayne Oil and Gas Co., Inc., 289 S.E.2d 197 (W.Va. 1982); Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982); Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

Syllabus point 4 of *Fleming* instructs the trial court to apply the five factors to be considered by the jury and four [47] additional factors for the trial court's review in evaluating the excessiveness of a punitive damage award. When reviewing the jury's punitive damage award, the trial court is to set out the reasons for changing (or not changing) the award. *Fleming Landfill*, slip op. at 28. Since *Fleming* was not in effect at the time of trial, TXO moved for judgment notwithstanding the verdict or a new trial, or in the alternative for remittitur based upon the pre-*Fleming Landfill* standard. R. 2100-2107, 2123-2167. However, at the hearing on the post-trial motions TXO argued the lack of harm, the outrageous disproportionality, the excessiveness in light of comparable or analogous case law, that any alleged injury was temporary since TXO filed a quiet title action and the court promptly cleared title, the lack of any personal injury, mental anguish or publication to a third party causing damage to reputation, the lack of any personal gain or profit to TXO, and other factors pertinent to an analysis of the punitive damages. TXO also argued the unconstitutionality of the excessive award and the lack of meaningful standards for the jury and the trial court. Tr. 792-810; R. 2123-2167. The Court summarily denied the post-trial motions from the bench. Tr. 818. The trial court's failure to state the reasons for denying these motions by itself requires reversal. *Fleming Landfill.*

With respect to syllabus point 4, the issue of the costs of litigation were discussed in terms of the attorney fees equalling $19,000, which of course the appellees were awarded. No criminal sanctions were imposed or applied. No other civil actions [48] based on the "same conduct" were presented to the Court. A remittitur motion was presented to the Court, but also rejected summarily. Tr. 815-818. The Court reasoned that TXO could have settled for $5 million before trial, consequently they could have "saved" $5 million. Tr. 816. This, however, avoids the question of the reasonableness of $10 million, or even $5 million, under the facts and circumstances of this case, in light of no actual injury other than attorney fees of $19,000.

In summary, the factors considered by the jury and the trial judge were those which represented pre-*Fleming Landfill* and *Haslip* standards. They do not meet the *Fleming Landfill* or *Haslip* standards and are not constitutionally permissible.

TXO respectfully submits that this case is closely analogous to *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197 (W.Va. 1982) in that it relates to a type of property damage. It is not a case involving a personal slander or libel to the reputation of a person in the community; it is not a case in which the respondents alleged or proved any special damages, a lost transaction, or a lost opportunity; it is not a case of a severe personal injury with resultant continuing and oppressive medical bills; nor is it a wrongful death case. It is a case in which there were no special damages, lost sales or other transactions involved. There is no evidence that the alleged "false statement", a quitclaim deed, was known to any third parties. The only compensatory damages awarded by the jury were attorney's fees of $19,000 incurred in defense of the declaratory judgment action to [49] clear title. The jury obviously invoked passion, prejudice and shocked the conscience by awarding punitive damages in a ratio of 526 to 1.

Counsel has been unable to find a case in which an award of anything closely approximating a ratio of 526 to 1 has been upheld under a similar case with little or no actual injuries suffered by a party.[11] The award is obviously excessive and must be set aside. *Fleming Landfill.*

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[11] As an illustration of what other courts consider reasonable or excessive awards in slander of title cases, consider: *Hagan v. Liberty Loan Corp. of Ames, Iowa*, 423 N.W.2d 886 (Iowa Ct. App. 1988) (award of $32,000 in punitive damages not excessive where the plaintiffs were awarded $32,000 in actual damages); *DeLeo v. Anthony A. Nunes, Inc.*, 546 A.2d 1344 (R.I. 1988) (trial justice did not abuse discretion where he reduced a $75,000 punitive damage award to $30,000 and a compensatory damage award of $104,114 to $89,421); *Castaic Clay Mfg. Co. v. Dedes*, 240 Cal. Rptr. 652, 195 Cal.App.3d 444 (Cal. Dist. Ct. App. 1987) (punitive damage award of $200,000 not excessive where compensatory damage award amounted to $529,641.23); *Seeley v. Seymour*, 237 Cal. Rptr. 282, 190 Cal. App.3d 844 (Cal. Dist. Ct. App. 1987) (punitive damage award of $2,660,000 against an individual defendant was excessive where a number of defendants were held jointly and severally liable for $200,000 in compensatory damages); *McDonald v. Bennett*, 674 F.2d 1080 (5th Cir. 1982) (punitive damage awards of $150,000 each against numerous defendants not excessive where actual damages remaining after remittitur amounted to $98,905); *Greenspun v. Summa Corp.*, 98 Nev. 528, 655 P.2d 513 (1982) (punitive damage award of $1,000,000 not excessive in light of defendant's [Howard Hughes] financial net worth); *Madden v. Muth*, 1981 W.L. 4769 (Ohio App. 1981) (unpublished opinion) (punitive damage award of $8,000 excessive and against the weight of the evidence where compensatory damage award amounted to $6,000 and included attorney fees); *Proctor v. Gissendaner*, 579 F.2d 876 (5th Cir. 1978) (punitive damage award of $31,560 upheld where compensatory damages were $8,440); *Jumping Rainbow Ranch v. Conklin*, 167 Mont. 367, 538 P.2d 1027 (Mont. 1975) (award of $4,000 in actual damages and $1,000 in punitive damages was not excessive); and *Misco Leasing, Inc. v. Keller*, 490 F.2d 545 (10th Cir. 1974) (punitive damage award of $10,000 not excessive where actual damages amounted to $6,572.13).

OCT 19 1992

No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE WEST VIRGINIA CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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MOTION OF THE WEST VIRGINIA CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The West Virginia Chamber of Commerce ("Chamber") hereby requests, pursuant to Rules 21.2(b) and 37.2 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of petitioner. The Chamber has obtained consent from petitioner's counsel to file this brief.[1] Counsel for respondents, however, refused to grant consent.

The Chamber, headquartered in Charleston, is West Virginia's largest non-profit federation of businesses, representing more than 1,000 corporations, partnerships and proprietorships. The Chamber also coordinates the activities of approximately 56 local chambers of commerce, with aggregate memberships exceeding 25,000 businesses,

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[1] A letter of consent from petitioner's counsel has been filed with the Clerk of the Court.

and provides assistance to several business, trade and professional associations. Substantially all of the private employment in West Virginia has been created by businesses represented, either directly or through local affiliates, by the Chamber. The Chamber regularly advocates its members' views in court on issues of statewide and national concern to the business community.

The Chamber has a practical interest in the fair and sensible application of punitive damage statutes. The capricious application of such statutes, as exemplified by the decision below, will have highly deleterious effects on a business climate which the Chamber and its local affiliates have worked hard to improve over many years. Indeed, in today's world of highly mobile businesses, West Virginia must compete with similar states for businesses that are relocating in order to escape costly overhead in large cities and to provide a better quality of life for their employees. The threat posed by capricious impositions of massive punitive damage awards undoubtedly will hinder West Virginia's ability to compete in this regard.

The Chamber thus believes that it offers both a strong and unique perspective upon this case as *amicus curiae* that will assist this Court in evaluating the opinion of the Supreme Court of Appeals of West Virginia and its relation to this Court's opinion in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). The foregoing motion therefore should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), violated the Fourteenth Amendment.

2. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated substantive due process.

3. Whether petitioner was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), interpreting the requirements of the Due Process Clause of the Fourteenth Amendment.

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On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF OF THE WEST VIRGINIA CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The West Virginia Chamber of Commerce ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner. The interest of the Chamber as *amicus curiae* is fully set forth in the Motion for Leave to File a Brief as *Amicus Curiae* printed herewith *ante*.

SUMMARY OF ARGUMENT

In the decision below, the West Virginia Supreme Court upheld a punitive damage award of ten million dollars against petitioner, TXO Production Corp. ("TXO"), which was no less than 526 times the amount of compensatory damages of $19,000 awarded to respondents, Alliance Resources Corp., Tug Fork Land Company, George King, and Grover C. Goode. This case was not one in which a plaintiff suffered grevious personal injury or a business coldly calculated that physical injuries from a defective product ultimately would cost less than removing the defect. Instead, the underlying action here was for "slander of title." Respondents claimed that petitioner had diminished the value of respondents' title to oil and gas reserves on one parcel of land by filing a false "quiet title" action. The West Virginia Supreme Court upheld this stunning award of punitive damages on nothing more than its perception that TXO fell into the category of punitive damage defendants who are "really mean," as opposed to those who are "really stupid." If there ever were a paradigmatic case of punitive damages arbitrarily imposed under a wholly ineffective system of review, this is that case.

The West Virginia Supreme Court's decision amply illustrates the confusion in lower courts around the country respecting the Fourteenth Amendment due process requirements applicable to punitive damage awards. This Court offered some guidance as to these requirements in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), but it is now obvious that *Haslip* failed fully to clarify the requirements in a way that will ensure a rational process of imposing punitive awards. Because the West Virginia Supreme Court, like other state courts, has refused in the wake of *Haslip* to tether punitive damage awards to any reasonable guidelines, this Court's review of the system of awarding damages is once again warranted.

This case also presents an important and timely issue involving the retroactive application by state courts of new rulings on federal law. The West Virginia Supreme Court's opinion does further violence to petitioner's due process rights by failing to adhere to the rule of *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which this Court held that a newly announced federal rule cannot be selectively applied only to the case at bar and prospective cases, but also must be applied retroactively to cases still pending or not barred by res judicata or statutes of limitations, even if they arise on facts that predate the facts in the case at bar. In *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court announced, on the basis of *Haslip*, guiding factors in evaluating the propriety of a punitive award. *Garnes* was remanded for a new trial using the newly announced guidelines. However, a new trial was not afforded to petitioner. The Supreme Court's refusal to allow TXO the same opportunity to take advantage of these fundamental procedural protections cannot be squared with *James Beam*. Accordingly, review is further warranted so that this Court can make clear that the rule of *James Beam* applies to state courts as well as to federal courts when the state courts are interpreting the requirements of federal law.

REASONS FOR GRANTING THE PETITION

The opinion of the West Virginia Supreme Court poses a serious threat to businesses in West Virginia, and its odd application of this Court's holding in *Haslip* reflects a broader confusion that threatens businesses throughout this country. Without a more precise and detailed statement from this Court of the requirements of due process in the punitive damages context, the imposition of indiscriminate punitive damage awards will continue to wreak havoc upon the American business community, drive up costs at the expense of jobs at home, and harm competitive capabilities abroad.

1. This Court's holding in *Haslip* simply has not provided a clear enough message to lower courts with respect to the requirements of due process in the punitive damages context. This confusion arises out of the fact that *Haslip* examined and approved only Alabama's scheme for ensuring that punitive damage awards have some foundation in rationality. The approval of one common-law system, however, not only left the status of other, specific schemes uncertain, but also failed to identify any elements of Alabama's scheme as themselves essential to procedural due process. This uncertainty has virtually guaranteed the continued "skyrocketing" of punitive damage awards, which was of profound concern to this Court in *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989). See *Haslip*, 111 S. Ct. at 1038 ("In *Browning-Ferris* . . . all nine participating Members of the Court noted concern").

Several members of this Court foresaw the potential ambiguity in *Haslip*. Justice Scalia argued that the majority decision "provides no guidance as to whether any *other* procedures are sufficiently 'reasonable,' and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve." 111 S. Ct. at 1046-47 (Scalia, J., concurring). Justice Kennedy pointed out

that "[i]t is difficult to comprehend on what basis the majority believes the common law method might violate due process in a particular case after it has approved that method as a general matter, and *this tension in its analysis now must be resolved in some later case.*" *Id.* at 1055 (Kennedy, J., concurring) (emphasis added). See also *id.* at 1056-57 (O'Connor, J., dissenting) ("The Court's holding will . . . substantially impede punitive damages reforms").

After nearly two years and the failure of *Haslip* adequately to protect the due process rights of punitive damage defendants, the issue is again ripe for review. Numerous cases from both federal and state courts reveal the complete absence of due process limitations in punitive damage awards. See, *e.g.*, *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (compensatory damages of $317,625, punitive damages of $6.1 million), *cert. denied*, 112 S. Ct. 1778 (1992); *Thomas* v. *Principal Fin. Group*, 566 So.2d 735 (Ala. 1990) (compensatory damages of $1,000, punitive damages of $750,000); *Eichenseer* v. *Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (compensatory damages of $1,000, punitive damages of $500,000); *Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App.) (compensatory damages of $735,513, punitive damages of $5 million), *review granted*, 822 P.2d 1194 (Or. 1991). In light of the enormity of the private interests at stake, and especially in light of the effect that such awards have had on businesses throughout this country, review by this Court now is warranted and necessary.

2. The circumstances of this case offer the Court an excellent opportunity to further delineate the due process requirements outlined in *Haslip*. The West Virginia Supreme Court's standard for reviewing punitive damages on appeal offers no meaningful check at all upon the passions of "runaway juries" and thus constitutes a clear violation of due process. Cf. *Haslip*, 111 S. Ct. 1056 (O'Connor, J., dissenting) ("The Court relies heav-

ily on the State's mechanism for postverdict judicial review"). The West Virginia Supreme Court has created a distinction between "really mean" and "really stupid" that is impossible to draw in any principled or predictable way.[1] Two justices of the supreme court wrote separately to note that "by suggesting the use of such subjective and nontechnical terms as 'really stupid' and 'really mean,' the majority has offered no practical guidance to attorneys or judges in analyzing punitive damages cases." Pet. App. 54a.

The distinction becomes especially difficult to draw when judges must assess the actions of a business entity rather than those of a particular individual. Nevertheless, the court below has attached to its categorization scheme the most enormous of consequences, that is, a limitation on the ratio of punitive damages to compensatory damages in "really stupid" cases of five to one versus more than *five hundred* to one in "really mean" cases. Such capriciousness in a civil justice system cannot be tolerated under this Court's holding in *Haslip*. See 111 S. Ct. at 1045 ("post-verdict review [must] ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). See also *Matthews* v. *Eldridge*, 424 U.S. 319, 344 (1976) (greater procedural protections are needed as private property stakes increase and the risk that existing procedures will cause error also increases).[2]

---

[1] The supreme court itself noted the difficulty in using its categorization scheme and, in fact, eventually abandoned its attempt to categorize *Principal Financial Group* v. *Thomas*, 585 So.2d 816 (Ala.), *cert. denied*, 112 S. Ct. 649 (1991). Pet. App. 36a n.11 & Pet. App. 51a, 52a (failing to list *Thomas* in either category).

[2] The supreme court's appellate standard also is void for vagueness on constitutional grounds. *See Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (appellate scrutiny under the vagueness doctrine must intensify in proportion to the severity of the penalty imposed).

Moreover, the vacuous quality of the West Virginia Supreme Court's standard for reviewing punitive damages awards is itself a reflection of *Haslip*'s failure to provide meaningful guidelines to courts around the country. In announcing its standard, the supreme court claimed to have "examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable." Pet. App. 35a. It is therefore revealing that the supreme court, after such an examination, should have arrived at the virtually meaningless system of categorization that it did. See also Pet. App. 38a ("We cannot say that our examination of post-*Haslip* cases has led us to a crystal clear bright line of rule").

3. Two other features of the West Virginia Supreme Court's punitive damages scheme make this case particularly suitable for review. First, the Supreme Court's deference to the jury's verdict (see Pet. App. 40a) exacerbates the arbitrary and capricious nature of the West Virginia punitive damages scheme. See *Haslip*, 111 S. Ct. at 1063 (O'Connor, J., dissenting) (deference in Alabama's review mechanism makes "effective review even more unlikely"). In determining the degree to which petitioner's conduct might be deemed "reprehensible," the supreme court looked to the size of the jury's punitive damage award. Pet. App. 40a. The enormity of that award made it clear to the supreme court that petitioner belonged in the category of "really mean" defendants who are eligible for awards of punitive damages up to, and beyond, five hundred times the level of punitive damages. But this method of review is completely circular: The amount of the jury's award determines whether the defendant was "really mean" or "really stupid," and the category justifies the amount of the award. The supreme court's review therefore provides no effective check at all on "punitive damage awards [that] are frequently based upon the caprice and preju-

dice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

Second, the West Virginia Supreme Court's opinion makes clear that West Virginia, like certain other states, does not require trial courts in punitive damages cases to state on the record their reasons for interfering, or not interfering, with an award that is challenged as excessive. See, *e.g.*, *Commonwealth Lloyd's Ins. Co.* v. *Thomas*, 825 S.W.2d 135, 149 (Tex. Ct. App. 1992), *writ of error filed* April 22, 1992; *Republic Ins. Co.* v. *Hires*, 810 P.2d 790 (Nev. 1991). Without serious and open review at the trial level, however, appellate review becomes more critical and yet less effective. At bottom, the Court in *Haslip* identified interrelated factors to promote a fair system of awarding punitive damages and this case squarely presents the issue of whether these checks were mandatory or merely precatory.

4. The West Virginia Supreme Court's opinion also contradicts this Court's holding in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). There, the Court held that "new rules" respecting federal rights cannot be applied in a "selectively prospective" fashion, that is, a court cannot "retroactively" apply new rules it announces only to the litigants of that case, and thereby prevent other litigants from taking advantage of these new rules. *Id.* at 2448. Here, the West Virginia Supreme Court announced "new rules"—procedures which are to govern all punitive damages awards—in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). Although these procedures were founded upon federal due process rights and the supreme court's interpretation of *Haslip*, the supreme court refused to remand this case for a new trial on punitive damages as it did in *Garnes*. As the petition demonstrates (Pet. 18-20), the supreme court's refusal contradicts this Court's holdings in *James Beam*, as well as *Felder* v. *Casey*, 487 U.S. 131, 138

(1988) ("'[a] federal right cannot be defeated by the forms of local practice'") (quoting *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949)).

The West Virginia Supreme Court's refusal to allow petitioner the same right to a new trial on punitive damages as was afforded to the litigants in *Garnes* cannot be cured by its claim that such a ruling would "unnecessarily send far too many cases back for retrial." Pet. App. 32a. Litigants in petitioner's situation "are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements." *James Beam*, 111 S. Ct. at 2447. Nor can the supreme court assert that West Virginia's own "choice-of-law" rules govern remedial applications of these "new rules": "[T]he antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise." *Id.* at 2443.

As this case demonstrates, this Court needs to make clear that the retroactivity holding of *James Beam* applies to state courts that have announced "new rules" derived from federal law. Moreover, the issue is a recurring one because state courts around the country must apply their interpretations of *Haslip* to other, pending cases. Because *James Beam* obviously requires clarification, and because the issue is timely given the remedial "ripple effects" of *Haslip*, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 19, 1992

No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

American Petroleum Institute ("API") and National Association of Manufacturers of the United States of America ("NAM") move this Court for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari pursuant to Rule 37.2 of the Supreme Court Rules. Petitioner has consented to the filing of this brief *amici curiae*, but Respondents have declined to consent.

API and NAM are seeking leave to file their brief *amici curiae* because they have developed significant empirical information on punitive damages awards in West Virginia, as well as in several other states. This information, which demonstrates the national importance of this case, may be unavailable to the Court in its consideration of the petition for certiorari unless API and NAM are granted leave to file their *amici curiae* brief.

Moreover, in their *amici curiae* brief, API and NAM discuss two important, recent federal circuit court decisions applying this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991): *Johnson v. Hugo's Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992) (*en banc*), and *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992).

For these reasons, API and NAM request the Court to grant their motion for leave to file a brief *amici curiae*.

STATEMENT OF INTEREST

The *amici curiae* filing this brief have a significant interest in the outcome of this case. Recent years have seen dramatic and substantial growth in the amount of punitive damages awarded by juries in federal and state courts, including those in West Virginia. This growth requires careful scrutiny by the trial and appellate courts to check irrational awards. The West Virginia Supreme Court of Appeals has announced an unconstitutional and unworkable test to apply not only to the excessive award in this case, but also in all future punitive damages cases in West Virginia.

The American Petroleum Institute ("API") represents the interests of approximately 300 member companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining and marketing of petroleum products. As members of the domestic business community, API and its member companies are greatly concerned by the increase in untoward and excessive awards of punitive damages.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association representing more than 12,000 companies throughout the United States. NAM is affiliated with an additional 128,000 businesses through the National Industrial Council and the NAM Associations Council. NAM and its members are vitally interested in the unwarranted growth of punitive damages and the impact that this issue has on the economic viability of business in our highly competitive economy.

Because trial and appellate court review play a crucial role in controlling the amount of punitive damages awarded against Defendants, API and NAM urge the Court to grant the motion for leave to file a brief *amici curiae*

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IN THE

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TXO PRODUCTION CORP.,
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v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The statement of interest is included in the Motion for Leave to File Brief *Amici Curiae* in Support of Petitioner.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts as set forth by Petitioner.

SUMMARY OF ARGUMENT

1. This case warrants review by this Court because new empirical evidence shows that the amount of punitive damages awarded in final judgments in West Virginia,

and in other states, has grown dramatically over the past two decades. Between 1968 and 1985, the West Virginia appellate court affirmed only *one* judgment for punitive damages against a business enterprise. In the seven years since 1985, however, that court has affirmed *ten* awards for punitive damages against business enterprises. Furthermore, the amount of punitive damages reflected in these final judgments has increased steadily since 1985, and the $10 million award here pushes the curve even higher.

The West Virginia experience is basically consistent with the empirical evidence from California, New York, Illinois, and Texas, four states that contain about 31% of the population. Over the past two decades, final judgments awarding punitive damages under the laws of those four states against business enterprises increased an astonishing *117 times* in constant dollars.

Amici submit that this trend cannot simply be the natural development of a hoary legal idea rooted in the common law that is largely outside the ambit of the Due Process Clause. This case warrants review so that this Court may give further consideration to the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

2. The importance of thorough review of awards of punitive damages is underscored by the fact that juries are given virtually unlimited discretion in arriving at the amount of punitive damages sufficient to punish and deter a Defendant's conduct. This discretion has manifested in the remarkable growth rate of punitive damages awards in the last two decades. The careful review of awards approved in *Haslip* can effectively curtail excessive awards and unlimited jury discretion, as demonstrated by two recent decisions announced by the Third and Fourth Circuits. Because Defendants in West Virginia—and Defendants in the other states that have not heeded *Haslip*—are not receiving the review of punitive damages awards required by due process, this Court should provide additional guidance regarding the principles announced in *Haslip*.

ARGUMENT

I. THIS CASE HAS NATIONAL IMPORTANCE BECAUSE IT REFLECTS THE DRAMATIC GROWTH IN THE AMOUNT OF PUNITIVE DAMAGES AWARDED BY THE COURTS

The award of punitive damages in this case—an award more than 500 times the amount of the compensatory damages—is part of a trend of unconstrained growth in the amount of money paid to plaintiffs and their lawyers in the form of punitive damages during the last two decades.

A recent empirical study of punitive damages awards in California, Illinois, New York and Texas (states which contain 31% of the U.S. population) demonstrates the extent of the growth of punitive damages awards. Stephen M. Turner, *et al.*, *Punitive Damages Explosion: Fact or Fiction?* 2 (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992) (forthcoming).[1] The study compared awards in business-related cases in the four states in two time periods: awards from 1968 through 1971 were measured against awards during the years 1988 through 1991. The methodology behind the figures from this study is important because it was objective and extremely conservative. The figures represent only reported appellate decisions that affirmed judgments for punitive damages, *see, id.* at A1-A3, for two important reasons: First, these reported decisions are

[1] This study was undertaken by the General Counsel's Office of Texaco Inc. Counsel of record for API and NAM participated in this study and uses the results here with the permission of Texaco Inc.

The study analyzed cases from the four most recent years and, for purposes of comparison, looked to cases from the four year period twenty years earlier, 1968-71.

completely objective. No reliance was made on jury verdict reporters or on any anecdotal evidence. Each data point is supported by a reported case citation. Second, because the reported decisions all affirmed judgments for punitive damages, the figures represent the baseline amount that was actually paid by Defendants in the form of punitive damages. (Of course, reported cases affirming punitive damages awards without stating the amount of the award were not included.)

The study results showed that punitive damages from the period 1968-71 totalled only $800,000, but for the later period the total was $312 million. *Id.* at 2-4. This surge in dollars awarded as punitive damages represents an increase of more than 117 times, after correcting for inflation. In comparison, the U.S. Gross National Product has less than doubled in the same two decades. U.S. Bureau of the Census, *Statistical Abstract of the United States*, 1991, 431 (111th ed. 1991). Because the study included only awards reported in appellate court decisions, the amount actually paid as punitive damages from 1988 through 1991 in fact is much greater than $312 million. *See* Stephen M. Turner, *et al.*, *Punitive Damages Explosion: Fact or Fiction?* 3 (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992) (forthcoming) (study does not include cases where jury verdicts awarding punitive damages were settled before a final decision on appeal).

The rapidly increasing amount of money awarded as punitive damages in the last twenty years has far surpassed the increase in the number of cases filed. The number of cases resulting in awards of punitive damages from 1988 through 1991 is only five times greater than the number from 1968 through 1971. *Id.* at 2-4. Thus, while some of the growth in punitive damages has come in the number of cases, much more of the growth has come in the amounts juries have awarded—and appellate courts affirmed—as punitive damages.

A comparison of the growth in the amount awarded as compensatory damages to that for punitive damages also emphasizes the extent of the punitive damages explosion. While the dollar amount of compensatory damages increased 51 times in the twenty-year period, the amount awarded as punitive damages has increased 117 times. Texaco Inc., "An Empirical Study of Final Judgments Awarding Punitive Damages" (presented Oct. 15, 1992).[2]

At least one observer has suggested that the increase in the size of corporate assets has brought about the growth in punitive damages awards. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1256-57 n.403 (1992). To the contrary, however, the assets of the largest U.S. corporations have increased only about 5.6 times in nominal dollars over the last two decades, and measured in constant dollars the increase in assets has been a mere 1.7 times. *The Fortune Directory of the 500 Largest U.S. Industrial Corporations*, Fortune, May 1971, at 172, 188; *The Fortune Directory of the 500 Largest U.S. Industrial Corporations*, Fortune, Apr. 22, 1991, at 286, 305. If increasing corporate net worth is the explanation for the growth in punitive damages awards, it is inconsistent with this Court's approval of Alabama law which precludes introduction of evidence of defendant's net worth at trial. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 ("[T]he fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."). The preclusion of evidence of defendant's financial condition is consistent with principles of punishment in criminal cases; defend-

[2] Copies of this unpublished presentation will be served on counsel for Petitioner and Respondents and lodged with the Clerk of the Court.

ant's wealth or status generally does not factor into the assessment of a criminal fine or calculation of a criminal sentence.

West Virginia differs from the four states analyzed by the study only in that punitive damages awards do not enjoy a long history in that state: the years 1968 through 1984 saw virtually no awards of punitive damages in cases tried in state and federal courts in West Virginia. It is only in recent years—since 1985—that West Virginia Plaintiffs have received punitive damages.

Despite the recent advent of punitive damages awards in West Virginia, that state has followed the other states in the explosive growth in the amount of money awarded as punitive damages. In 1985—the first year of the punitive damages trend in West Virginia—the total dollar amount of punitive damages awarded was almost one hundred times greater than the one award in 1973 (the only year between 1968 and 1984 reflecting a punitive damages final judgment in West Virginia). The average award in 1985 was nearly fifty times greater than the award in 1973, after correcting for inflation. This growth has not abated; the total amount awarded steadily has increased from 1985 until 1991.

Like the other states, the growth in the amount of money awarded as punitive damages in West Virginia cannot be explained by the increase in the number of cases. The number of cases resulting in punitive damages final judgments from 1985 through 1991 represent an increase of ten times the number from 1970 through 1980. The increase in the amount of money paid by Defendants in West Virginia therefore is not the result of equal growth in the number of cases.

The long-term trend in West Virginia and around the country shows a dramatic increase in the resources drained from American business through awards of punitive damages. The total cost to American business of

defending against, and paying for, punitive damages amounts to a "windfall" for the plaintiff, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981), and directs business dollars away from investment in jobs and equipment. *Cf.* Note, *An Economic Analysis of the Plaintiff's Windfall From Punitive Damage Litigation*, 105 Harv. L. Rev. 1900, 1909 (1992) ("[T]he lure of the plaintiff's windfall . . . leads to increased accident costs, an artificially high rate of litigation, and a reduction of society's production possibility frontier."). Careful review by trial and appellate courts provides the only real constraint on the ever-increasing size (and number) of awards, yet Defendants are receiving widely disparate post-trial review of awards of punitive damages, depending solely on the accident of geography. This Court should provide additional guidance to remedy this disparate treatment.

II. THE WEST VIRGINIA DECISION BELOW, READ AGAINST THE BACKDROP OF *HUGO'S SKATEWAY* AND *DUNN*, SHOWS THE IMPORTANCE OF FURTHER CONSIDERATION BY THIS COURT OF THE *HASLIP* PRINCIPLES

This Court's decision in *Haslip* approved the traditional measure of liability for an award of punitive damages in a case of fraud, *see Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1043-44 (1991) (common-law method for assessing punitive damages does not violate due process but "general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus"), and directed attention to constraints placed on the discretion of the fact finder through post-trial review procedures in Alabama. Because both the trial and appellate courts in Alabama carefully measure any award for excessiveness by application of "detailed substantive standards" that have "real effect" on jury awards in Alabama, this Court affirmed the *Haslip* award. *Id.* at 1045. The Court determined that this review ensures that awards of punitive damages are not "greater than reasonably necessary

to punish and deter," and therefore comport with due process. *Id.* at 1045-46.

The need for this focus on jury discretion is evident in the idiopathic growth of punitive damages in the last two decades. Typical jury instructions do not provide any real guidance for the fact finder in calculating an amount of punitive damages; the jury is given virtually complete discretion. For example, the instructions approved in *Haslip* directed the jury to consider the harm caused and the sum necessary to punish and deter similar conduct in fixing the amount of punitive damages. *Id.* at 1037 n.1. In contrast, instructions in West Virginia (and other jurisdictions) regarding compensatory damages direct the jury to carefully weigh evidence of loss, to consider whether the loss could have been mitigated, and to determine whether plaintiff was contributorily negligent. *See, e.g., Raines v. Thomas*, 330 S.E.2d 334, 336 (W. Va. 1985) (in personal injury and property damage case jury instructed to "assess a percentage of fault" attributable to plaintiffs and defendant for damages calculations); *Middle-West Concrete v. General Ins. Co.*, 267 S.E.2d 742, 747 (W. Va. 1980) (jury properly instructed to consider whether plaintiff used "reasonable efforts . . . to lessen the damages" in action against surety); *State Road Comm'n v. Bowling*, 166 S.E.2d 119, 123 (W. Va. 1969) (compensatory damage instruction in eminent domain case appropriately directed the jury to ascertain fair market value of land and improvements, defined as price property will bring if offered for sale, based on evidence presented at trial). *See also* W. Va. Code § 55-7-5(2) (Michie 1992) (jury in wrongful death case must set forth separately in verdict form amount of damages awarded to compensate for funeral, hospital, medical and other related expenses).

The courts that have followed the guidance provided in *Haslip* have demonstrated the effectiveness of careful post-trial review in controlling excessive punitive damages

awards. For example, in *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992), the court determined that a review of an award of punitive damages by the trial court that included application of five factors pursuant to the law of the Virgin Islands provided adequate constraint on the discretion of the jury. The trial court's review resulted in reduction of a $25 million award of punitive damages in an asbestos personal injury case to $2 million. The Third Circuit cautioned district courts to "explicitly assess" the amount of any award of punitive damages in light of the specific review factors in all future cases. *Id.* *53 n.22.

In addition to the review conducted by the *Dunn* trial court, the Third Circuit also reviewed the award for excessiveness, resulting in further reduction of the award by half. The court considered the nature of plaintiff's injury as well as the multiple claims for punitive damages in the asbestos personal injury litigation, and concluded that $1 million represented the "maximum amount of punitive damages that could reasonably have been awarded." *Id.* at *76.

The Fourth Circuit also recently considered a challenge to an award of punitive damages, and, like the Third Circuit, concluded that the rigorous review conducted in Alabama and approved in *Haslip* was required for a constitutional award process. In *Johnson v. Hugo's Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992) (*en banc*), the Fourth Circuit vacated and remanded an award of $175,000.00 in punitive damages as inconsistent with the standards announced in *Haslip*. The court determined that the "limited scope of review" afforded in federal court pursuant to Fed. R. Civ. P. 59 denied defendant due process. The court concluded that due process requires federal courts in diversity actions to compensate for this limited review by including in instructions to the jury substantive factors like those applied on review of an award of punitive damages by Alabama

courts and approved in *Haslip*. *Id.*; *accord Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

This Court's decision in *Haslip* has focused attention on the need to moderate jury discretion in the amount of money awarded as punitive damages, and the decisions in *Dunn* and *Hugo's Skateway* demonstrate that careful post-trial consideration of the awards is an effective means for controlling that discretion. Decisions like that announced by the West Virginia Supreme Court of Appeals in this case will, absent further guidance from this Court, perpetuate the dramatic growth rate of punitive damages. Additional guidance from this Court is necessary to ensure that unbridled jury discretion resulting in excessive awards of punitive damages is controlled.

CONCLUSION

For the reasons stated above and in the Petition filed by TXO Production Corporation, the writ of certiorari should be granted and the decision of the West Virginia Supreme Court of Appeals reversed.

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Supreme Court, U.S.
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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 17, 1992
CERTIORARI GRANTED NOVEMBER 30, 1992

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RELEVANT DOCKET ENTRIES

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action Number 85-C-550

TXO PRODUCTION CORP, A Delaware Corporation licensed to do business in West Virginia; AMERICAN PETROFINA COMPANY OF TEXAS, a corporation; FINADEL, INC. APCOT-FINADEL GENERAL PARTNERSHIP, a Texas general partnership; and APCOT-FINADEL JOINT VENTURE, a general partnership, *Plaintiffs,*

vs.

ALLIANCE RESOURCES CORP., a Texas corporation licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,
Defendants.

DATE	PROCEEDINGS
8/23/85	Complaint filed. Summons issued. 30 days Secretary of State. 30 days personal.
8/29/85	Summons filed. Accepted Service by Secretary of State as to Tug Fork Land Company 8-26-85.
8/29/85	Summons filed. Accepted Service by Secretary of State as to Alliance Resources Corporation 8-26-85.
9/3/85	Summons filed. Executed as to Grover C. Goode 8-27-85.
9/3/85	Summons filed. Executed as to George King 8-26-85.
9/25/85	Stipulation filed.

DATE	PROCEEDINGS
9/25/85	Answer to Complaint for Declaratory Judgment on behalf of Tug Fork Land Company filed.
9/25/85	Original and copy of Answer of Defendants, George King and Grover C. Goode filed.
10/16/85	Motion to Dismiss filed.
10/22/85	Answer of Alliance Resources Corporation filed.
10/25/85	Motion and Notice filed.
10/29/85	Notice and Motion to Dismiss filed.
11/4/85	Response to Motion to Dismiss Filed by Defendant, Alliance Resources Corporation filed.
11/4/85	Affidavit filed.
11/12/85	Motion to Dismiss filed.
12/5/85	Request for Admissions filed.
1/13/86	Response to Request for Admissions filed.
2/13/86	1 Subpoena on behalf of the plaintiff.
2/19/86	Notice of Deposition filed.
2/19/86	Motion for Summary and/or Declaratory Judgment filed.
2/21/86	Notice of Deposition filed.
3/13/86	Interrogatory filed.
3/20/86	Order filed. Attested copies issued.
3/24/86	Plaintiff's Answer to Interrogatory of Defendant, Tug Fork Land Company filed.
4/15/86	Deposition of Lillian Wilson, Ph. D. filed.
4/16/86	Amended Complaint filed.
4/25/86	Answer of Alliance Resources Corporation to the Amended Complaint filed.
4/28/86	Answer of Tug Fork Land Company to Amended Complaint filed.

DATE	PROCEEDINGS
5/1/86	Answer of Defendants, George King and Grover C. Goode, to the Amended Complaint filed.
5/8/86	Motion to Dismiss and Reply to Counterclaim of Tug Fork Land Company filed.
5/8/86	Motion to Dismiss and Reply to Counterclaim of Alliance Resources Corporation filed.
5/8/86	Motion to Dismiss and Reply to Counterclaim of George King and Grover C. Goode filed.
5/14/86	Order for a non-jury trial filed.
6/19/86	Request of Defendant, Alliance Resources Corp., to Plaintiffs for Production of Documents filed.
7/16/86	Plaintiffs' Interrogatories to Defendant Alliance Resources Corp. filed.
7/16/86	Request for Production and Copying of Documents filed.
7/16/86	Request for Production and Copying of Documents filed.
7/16/86	Request for Production and Copying of Documents filed.
7/16/86	Plaintiffs' Interrogatories to Defendants George King and Grover C. Goode filed.
7/16/86	Plaintiffs' Interrogatories to Defendant Tug Fork Land Company filed.
7/30/86	Notice and Motion Under Rule 37(a) filed.
10/15/86	Request for Admissions filed.
11/7/86	Answer to Plaintiffs' Interrogatories by Defendant, Alliance Resources Corp. filed.
11/7/86	Response of Defendant, Alliance Resources Corp., to Plaintiffs' Request for Production and Copying of Documents filed.

DATE	PROCEEDINGS
11/7/86	Response of Defendant, Alliance Resources Corp., to Plaintiffs' Request for Admissions filed.
11/7/86	First Set of Interrogatories and Second Request of Defendant, Alliance Resources Corp., to Plaintiffs for Production of Documents filed.
11/10/86	Answer to Request for Admissions filed.
12/1/86	Partial Response to Motion to Produce Documents filed.
1/2/87	Answer to Plaintiffs' Interrogatories by Defendants, George King and Grover C. Goode filed.
1/7/87	Answers to Request for Admissions filed.
1/22/87	Motion to Compel filed.
2/3/87	Plaintiffs' Response to Motion to Compel filed.
2/25/87	Order filed. Attested copies issued.
3/31/87	Request of Defendant, Alliance Resources Corp. to Plaintiffs for Production of Documents Third Set filed.
4/6/87	Affidavit from Douglas Black filed.
4/7/87	Plaintiffs' Trial Memorandum filed. (Pages were substituted as directed in letter)
5/8/87	Affidavit of Houston Welch filed.
5/26/87	Defendant, Alliance Resources Corporation Second Set of Interrogatories and Fourth Request for Production of Documents to Plaintiffs filed.
6/12/87	Defendant Alliance Resources Corp.'s Memorandum of Law and Note of Argument with Respect to the Issues Raised in the Plaintiffs' Amended Complaint filed.
6/15/87	Defendant Tug Ford (sic) Land Company's Memorandum of Law with Respect to the Issues Raised by the Complaint filed.

DATE	PROCEEDINGS
6/26/87	Motion filed.
6/26/87	Plaintiffs' Response to Defendant, Alliance Resources Corporation Second Set of Interrogatories and Fourth Request for Production of Documents to Plaintiff filed.
6/29/87	Motion of Defendant, Alliance Resources Corporation, to Compel Plaintiffs to Respond to Discovery filed.
8/3/87	Plaintiffs' Response to Defendant, Alliance Resources Corporation Second Set of Interrogatories and Fourth Request for Production of Documents filed.
9/30/87	Order setting case for non-jury trial filed.
12/7/87	Motion In Limine to Prevent Plaintiffs From Using Expert and Extrinsic Evidence filed.
12/7/87	Tug Fork Land Company's Answers to Plaintiffs' Interrogatories filed.
12/17/87	Response to Defendants' Motion in Limine to Prevent Testimony of Expert Witnesses filed.
3/11/88	Order filed.
3/14/88	Motion to Prepare Transcript filed.
3/14/88	Order to Prepare Transcript filed. Attested copy issued.
3/23/88	Original and copy of transcript filed.
12/9/88	Third Set of Interrogatories of Defendant Alliance Resources Corp., to Plaintiff, TXO Production Corp. filed.
12/9/88	Interrogatories of Defendant, Alliance Resources Corp. to Plaintiffs, American Petrofina Company of Texas, a Corporation, Finadel, Inc., a Corporation, Apcot-Finandel (sic) General Partnership and Apcot-Finadel Joint Venture filed.

DATE	PROCEEDINGS
1/20/89	Answers to Third Set of Interrogatories of Defendant Alliance Resources Corp. to Plaintiff, TXO Production Corp. filed.
1/20/89	Answers to Interrogatories Of Defendant, Alliance Resources Corp. To Plaintiffs, American Petrofina Company of Texas, A Corporation, Finadel, Inc., A Corporation, Apcot-Finadel General Partnership and Apcot-Finadel Joint Venture filed.
1/30/89	Stipulation filed.
2/23/89	Motion of Defendants to Substitute Parties filed.
2/23/89	Interrogatories and Motion to Produce of Defendant, Alliance Resources Corp. to Plaintiff, TXO Production Corp. 4th Set filed.
3/27/89	Stipulation filed.
4/3/89	Order Filed.
4/11/89	Plaintiff TXO Production Corp's Ansers (sic) To Interrogatories And Motion To Produce Of Defendant, Alliance Resources Corp. 4th Set.
8/15/89	Motion to Compel Answers to Interrogatories and Response to Request for Production of Documents filed.
8/31/89	Order continuing case filed. Attested copies issued.
10/16/89	Order Filed. Attested copies mailed to all counsel.
11/13/89	Plaintiff TXO Production Corp's Supplemental Answers To Interrogatories and Motion to Produce of Defendant, Alliance Resources Corp. Third Set filed.
1/23/90	Supplemental Responses to Interrogatories filed.
2/26/90	Supplemental Interrogatories filed.
2/26/90	Request for Admissions filed.

DATE	PROCEEDINGS
4/30/90	Plaintiffs' Memorandum in Support of Motion to Dismiss Slander of Title Counterclaim Or In The Alternative to Dismiss it as to all Plaintiffs Except TXO Production Corp. filed.
4/30/90	Notice filed.
4/30/90	Motion to Dismiss Slander of Title Counterclaim Or In The Alternative to Dismiss It As to all Plaintiffs Except TXO Production Corp. filed.
4/30/90	Notice filed.
4/30/90	Motion filed.
4/30/90	Notice filed.
4/30/90	Motion filed.
4/30/90	Motion to Dismiss and Amended Reply to Counterclaim filed.
5/10/90	Answer of Defendant, Alliance Resources Corp. to Plaintiffs' Supplemental Interrogatories filed.
5/15/90	Defendant Tug Fork Land Company's Reply Memorandum To Plaintiffs' Memorandum In Support Of Motion To Dismiss Slander Of Title Counterclaim Or In The Alternative To Dismiss It As To All Plaintiffs Except TXO Production Corp. filed.
5/18/90	Copy of letter filed.
5/18/90	Response to Request for Admissions filed.
5/18/90	Order setting case for trial filed.
5/29/90	Plaintiffs' Reply to Defendant Tug Fork's Answering Brief of Authorities filed.
5/30/90	Memorandum in Response to Plaintiffs' Reply Brief of May 25, 1990 Filed on Behalf of All Defendants filed.
6/6/90	Notice of Depositions filed.

DATE	PROCEEDINGS
6/6/90	5 Subpoenas on behalf of defendant, Alliance Resources Corp.
6/6/90	4 Notices of Deposition filed.
6/15/90	Deposition of James P. Pruitt filed.
6/15/90	Plaintiffs Trial Memorandum filed.
6/15/90	Plaintiffs' Motion in Limine to Exclude Deposition Testimony Offered by Defendants filed.
6/15/90	[Plaintiffs' Memorandum] Special Damages Is An Essential Element of a Slander Of Title Action. Absent a Particular Lost Transaction, No Cause of Action Exists and Attorney Fees Are Not Recoverable filed.
6/15/90	[Plaintiffs' Memorandum] Malice Is An Essential Element To A Slander of Title Action. Good Faith In Asserting a Property Interest Is A Complete Defense. A Party Who Acts Upon Advice of Counsel is not Liable in Damages For Slander of Title filed.
6/15/90	[Plaintiffs' Memorandum] Actual Malice is a Prerequisite To Pumitive (sic) Damages in a Slander of Title Action. Actual Malice is Different From the Malice Needed to Sustain Actual Damages. A Person Who Relies On the Advice of Counsel Is Not Liable in Punitive Damages filed.
6/18/90	Order begining (sic) trial of case filed.
6/18/90	Order allowing Timonty (sic) M. Miller leave to appear as counsel for the Plaintiffs filed.
6/18/90	Order Denying Summary Judgment filed.
6/18/90	Memorandum of Law on The Elements of Slander of Title filed.
6/18/90	Memorandum of Law on the Admissibility of Evidence of Other Acts Under 404(b) Of the Rules of Evidence filed.

DATE	PROCEEDINGS
6/18/90	Admissibility of Deposition Evidence of Attorneys Who Have Represented Parties in Litigation Against TXO And Its Subsidiaries filed.
6/18/90	Defendant Tug Fork Land Company's Memorandum Of Law Concerning Opinion Evidence Under Rule 701 and 702 West Virginia Rules of Evidence filed.
6/18/90	Order adjourning trial of case filed.
6/21/90	Order resuming trial of case filed.
6/21/90	Order adjourning trial of case filed.
6/22/90	Order resuming trial of case filed.
6/18/90	Deposition of R. H. Madden, III filed.
6/18/90	Deposition of Mr. Clarence Harrison, Jr. filed.
6/18/90	Deposition of Allan Devore filed.
6/18/90	Deposition of D. Michael Good filed.
6/22/90	Deposition of James P. Pruitt filed.
6/22/90	Deposition of Robert Wallace filed.
6/29/90	Judgment on Jury Verdict filed.
7/6/90	TXO's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial filed.
7/31/90	Defendants' Motion to Compel Surety of Bond filed.
8/24/90	Order setting hearing on motions filed. Attested copies mailed to Wade T. Watson, G. David Brumfield, Grover C. Goode, Timothy M. Miller.
9/14/90	Alternative Motion of TXO Production Corp. For Stay Of Enforcement of Judgment Pending Appeal filed.
9/14/90	Notice of Motion filed.

DATE	PROCEEDINGS
9/18/90	TXO's Memorandum of Law in Support of its Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial, and in the Second Alternative Motion for Remittur (sic) filed.
9/20/90	Plaintiff's Motion for Preparation of Transcript filed.
9/20/90	Order to Prepare Transcript filed. Attested copies issued.
9/28/90	Order denying motion filed.
10/22/90	Supersedeas Bond executed.
10/29/90	Petitoner's Designation of the Record for Appeal filed.
12/11/90	Certification filed.
12/11/90	Original and copy of Transcript filed.
12/27/90	Stipulation filed.
12/27/90	Supplemental Supersedeas Bond filed.
1/9/91	Motion for Extension of Appeal Period filed.
1/9/91	Agreed Order Extending Appeal Period filed.
3/26/91	Original and seven copies of petition for appeal filed.
7/12/91	Order from the Supreme Court of appeal granting appeal filed.
7/19/91	Bond Executed. ($50.00 Cash received from Robinson & McElwee) Attested copy of bond mailed to Supreme Court of Appeals.
7/23/91	Second Supplemental Supersedeas Bond filed.
7/29/91	Petitioner's Designation of the Record for Appeal filed.

DATE	PROCEEDINGS
8/9/91	Designation of Record for Appeal on Behalf of Alliance Resources Corp., Tug Fork Land Company; George King; and Grover C. Goode filed.
1/24/92	Third Supplemental Supersedeas Bond filed.
5/15/92	Syllabus by the Court filed.
6/26/92	Order from Supreme Court of Appeals filed.
7/24/92	Fourth Supplemental Supersedeas Bond filed.
7/24/92	Copy of McHugh, Chief Justice, concurring filed.
12/11/92	Correspondence from Supreme Court of Appeals filed.

IN THE CIRCUIT COURT
OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action Number 85-C-550

TXO PRODUCTION CORP, A Delaware Corporation licensed to do business in West Virginia; AMERICAN PETROFINA COMPANY OF TEXAS, a corporation; FINADEL, INC. APCO-FINADEL (sic) GENERAL PARTNERSHIP, a Texas general partnership; and APCOT-FINADEL JOINT VENTURE, a general partnership, *Plaintiffs*

vs.

ALLIANCE RESOURCES CORP., a Texas corporation licensed to do business in West Virginia; TUG FORK LAND COMPANY, a West Virginia corporation; GEORGE KING, an individual; and GROVER C. GOODE, an individual,
Defendants

ORDER

The above-styled matter came on for trial before this court without a jury on December 17, 1987. All parties by their counsel announced ready and the Court requested if there were any preliminary matters to be taken up prior to the taking of evidence on the merits.

The defendant Tug Fork Land Company move the Court *in limine* to prohibit plaintiffs from introducing expert and extrinsic evidence, concerning the construction and the interpretation of the deeds or instruments of title in issue in this case, and particularly the deed from Tug Fork Land Company to Leo J. Signaigo, Jr., dated the 2nd day of September, 1958 which is more fully set out in the defendants written motion in limine filed in this court and made a part of this case.

The Court after reviewing the pleadings, exhibits, motion, memorandum in Support of said motion, the Response to Defendant's motion, and argument of counsel for the respective parties is of the opinion that said motion in limine should be granted and it is so ORDERED. After which ruling the plaintiffs by counsel indicated that they would not proceed on the merits due to the Courts ruling on said motion.

In accordance with said ruling, the Court states that it considered all of the pleadings, exhibits, motion, and briefs in support thereof and opposition thereto, oral arguments made by counsel before the Court and any evidence and exhibits admitted into evidence at said hearing all considered as part of the evidence in this case. The Court makes the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

1. This matter is before the Court on plaintiff's Complaint for Declaratory Judgment to determine the ownership of oil and gas underlying 1,002.74 acres on upper Hensley Branch, Browns Creek District, McDowell County, West Virginia, which is described in three separate parcels in that certain deed from Tug Fork Land Company to Leo J. Signaigo, Jr., dated September 2, 1958, of record in the office of the Clerk of the County Commission of McDowell County, West Virginia, in Deed Book 238, at page 562. Parcel Number 1 describes a 7.64 acre tract. Parcel Number 2 describes a 445 acre tract. Parcel Number 3 describes a 547.7 acre tract. All of the tracts were obtained in fee by Tug Fork Land Company from Roderfield Realty by deed dated May 16, 1958.

2. Although defendants have asserted a counterclaim, the only matter now before the Court, both parties having waived a jury trial, is the plaintiff's request for a declaratory judgment as to whether there is ambiguity in

the above deed and subsequent deeds attached as exhibits to the complaint as to the oil and gas ownership, the Court's determination of such ownership and whether, in view of the Court's determination, the quit claim deed obtained by plaintiff is of any force or effect, and if so, whether plaintiff is under a fiduciary duty to transfer such title to Tug Fork and if so, whether plaintiff is entitled to be reimbursed for its expenses in clearing title by Alliance through the warranty clause in the assignment of the oil and gas lease from Tug Fork.

3. The plaintiffs contend that there is a cloud on the title to the oil and gas underlying the 1,002.74 acre tract, because of what they allege is an ambiguity in the deed of September 2, 1958 from Tug Fork Land Company to Leo J. Signaigo, Jr. and the failure of Tug Fork Land Company to have itself assessed and to pay real estate taxes upon such oil and gas interest. According to plaintiffs contention the deed is ambiguous and it is possible the granting clause in the deed conveys the oil and gas to Signaigo inasmuch as it granted "all the coal and other minerals and mineral substances in, on and underlying the . . . . tracts or parcels of land" and inasmuch as the later limiting clause in the deed may only act to reserve the oil and gas in the Pocahontas #3 and #4 seams (the coal bed gas) and not the oil and gas in any other formation. The exception and reservation is as follows:

> 2. There is excepted and reserved from the operation of this deed:
>
> (a) All the oil and gas and all the coal in the Pocahontas No. 3 and 4 seams in said three tracts of land above described.

In a later paragraph in the deed, the reservations and exceptions relating to the oil and gas are further elaborated upon as follows:

> 6. It is understood and agreed that there is excepted and reserved to the party of the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

4. Plaintiff, TXO Production Corporation, claims title to the oil and gas underlying said tracts by virtue of a quit claim deed it obtained from Virginia Crews Coal Company dated May 7, 1985, wherein Virginia Crews purported to convey "all of its right, title and interest in and to the oil and gas underlying the tracts." Although Virginia Crews Coal Company would only give a quit claim deed for the consideration of $6,000.00 to cover any interest it might have acquired to the oil and gas underlying the tracts, there is no question that Virginia Crews Coal Company did own all of the coal underlying the tracts, except Pocahontas No. 3 and 4 seam, by virtue of having obtained title to that mineral interest from Hawley Coal Mining Corporation, by deed dated July 21, 1983. Hawley Coal Mining Corporation obtained title to the minerals, subject to the reservations in the deed from Tug Fork Land Company to Leo J. Signaigo, Jr. of September 2, 1958, from Leo J. Signaigo, Jr., who had conveyed it to Empire Coal and Land Corporation by deed dated April 11, 1961, and Empire Coal and Land Corporation merged into Hawley Coal Mining Corporation by certificate of merger dated December 31, 1969.

5. Defendant, Tug Fork Land Company, claims that it reserved all the oil and gas underlying the tracts of land conveyed to Leo J. Signaigo, Jr. by deed dated September 2, 1958, and that on September 1, 1984, Tug Fork Land Company leased the oil and gas to George King, who assigned said lease to Alliance Resources Corporation on February 25, 1985, reserving a 1/16th overrid-

ing royalty in the oil and gas produced under the assigned lease. George King then assigned one-half of his one-sixteenth overriding royalty to Grover C. Goode. On April 2, 1985, Alliance Resources assigned the said Tug Fork lease to TXO Production Corp., with two other leases, for the sum of $31,794.80.

6. Upon the specific request of plaintiffs' counsel, the Court further finds based upon plaintiffs' Request for Admissions directed to defendants and defendants responses thereto, that subsequent to the Tug Fork to Signaigo deed, and up until the time of plaintiff's filing of this declaratory judgment action, Tug Fork Land Company, although claiming title to all of the oil and gas under the realty in question, was not listed in the McDowell County Land Books as owning such oil and gas and had not been paying taxes therefore.

CONCLUSIONS OF LAW

1. A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation, but will be applied and enforced according to such intent. *Sally-Mike Properties v. Yokum*, 332 S.E.2d 597 (W.Va. 1985); *Cotiga Development Company v. United Fuel Gas Company*, 147 W.Va. 484, 128 S.E.2d 626 (1962); *Davis v. Hardman*, 1 W.Va. 82, 133 S.E.2d 77 (1963); *Tate v. United Fuel Gas Company*, 137 W.Va. 272, 71 S.E.2d 65 (1952).

2. In construing a deed, the function of the court is to ascertain the intent of the parties as expressed in the language used by them. All rules of construction must yield to the expressed intention of the parties if that can be ascertained. *Davis v. Hardman*, 148 W. Va. 82, 133 S.E.2d 77 (1963).

3. The fundamental principle in interpreting deeds is that the intention of the parties, if ascertainable, pre-

vails, and, as a general rule, it is necessary to consider the entire instrument as a whole in order to ascertain that intent. Where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily, will not resort to parol or extrinsic evidence. *Pochahontas Land Corp. vs. Evans*, 332 S.E.2d 604 (W. Va. 1985). Thus, in the instant case, the court, finding that the intention of the parties is clearly expressed in the language of the deed, is of the opinion and does find that it is unnecessary to resort to parol or extrinsic evidence.

4. The construction of the words of a deed is a matter of law for the court to decide, and is not a subject for the introduction by the parties of opinion evidence thereon. Thus, the Court considers the motion in limine filed by defendant Tug Fork Land Company, to exclude expert and extrinsic evidence, well taken and grants said motion to prohibit plaintiffs from introducing expert evidence on matter of law, such as the construction of the deeds herein. *Berkeley Public Service District v. Vitro Corp.*, —— W. Va. ——, 162 S.E.2d 189 (1968). See also *Marx & Co. v. Diners Club, Inc.*, 550 F.2d 505 (2d Cir. 1977); and *Adalman v. Baker, Watts & Co.*, 807 F.2d 359 (1986 4th Cir.).

5. The Court finds, as a matter of law, that there is no ambiguity in the above deed reservations, and that Tug Fork Land Company intended, by the language used in Paragraphs 2(a) and 6, to reserve the coal in the Pocahontas No. 3 and 4 seams, and all of the oil and gas underlying the 1,002.74 acres, described in the three tracts, in its deed of September 2, 1958 to Leo J. Signaigo, Jr. Therefore, Tug Fork Land Company retained title to the oil and gas and leased it to George King, who, in turn, assigned it to Alliance Resources, which, in turn, assigned said lease to TXO Production Corp. as explained above.

6. The Court further finds, as a matter of law, that TXO Production Corp. obtained no interest or title to the oil and gas underlying the 1,002.74 acres in question from Virginia Crews Coal Company by reason of the quit claim deed in question. The quit claim deed of Virginia Crews Coal Company conveyed no title to TXO Production Corp. because Virginia Crews Coal Company obtained no title to the oil and gas from Hawley Coal Mining Corporation and said quit claim deed is, therefore, a nullity.

7. The Court, although denying plaintiff's motion that its Request for Admissions and defendants' responses thereto be admitted in evidence and the Court only considering the same as being proffered, finds, as a conclusion of law, that the failure of Tug Fork Land Company to have itself listed and assessed in the appropriate McDowell County Land Books and to pay real estate taxes for its oil and gas interest under the realty in question, when considered either separately or in conjunction with the alleged ambiguity of the Tug Fork to Signaigo deed, did not create any cloud on Tug Fork's title to such oil and gas nor did it contribute to any ambiguity in the Tug Fork to Signaigo deed which might justify TXO in taking curative action to clear such cloud on title or in bringing this declaratory judgment action for such purpose.

8. The Court further finds and orders that by reason of the Court's findings and orders the plaintiff is not entitled to recover any of its costs and expenses, including, but not limited to, the $6,000.00 paid to Virginia Crews Coal Company for the quit claim deed in question.

It is further ORDERED that the Clerk transmit a copy of this Order to the Clerk of the County Commission of McDowell County, West Virginia, and that the said Order be filed in the public records of the office of the said Clerk of the County Commission, showing that the quit claim deed from Virginia Crews Coal Company,

dated May 7, 1985, to TXO Production Corp., of record in the office of the Clerk of the County Commission, in Deed Book 380, at Page 180, is hereby ADJUDGED and DECREED to be void and of no effect, thereby removing any cloud on the title to the oil and gas rights of Tug Fork Land Company, its successors in title, lessees and assignees.

Plaintiff objects and excepts to the Court's findings and rulings and moves the Court for permission to immediately appeal the Court's rulings, which motion is granted. Plaintiff is, therefore, granted a stay of execution of this judgment for a period of sixty (60) days from the date of entry of this Order in which plaintiff may petition the West Virginia Supreme Court of Appeals for an appeal of the Court's ruling, and should such petition be filed within this sitxy (60) day stay of execution, this stay of execution of judgment shall be automatically extended until the Supreme Court of Appeals has ruled thereon.

The Clerk is directed to forward a copy of this Order to all Counsel of record.

This case is, therefore, continued as to defendants' counterclaim for further discovery and to be brought on under the Rules of Civil procedure.

/s/ Booker T. Stephens
Judge

EXCERPTS FROM RULINGS ON INSTRUCTIONS AND INSTRUCTIONS AS GIVEN TO THE JURY DATED MAY 22, 1990

* * * *

[719] Thereupon the Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 were received into evidence, the same being in the custody of the Circuit Clerk.

THE COURT: Did you renew your motions?

MR. MILLER: Yes. Secondly, I would like to renew at this time all of the motions for a directed verdict made by plaintiff TXO at the close of the defendant's case in chief.

THE COURT: Those will all be denied and overruled.

MR. MILLER: Your Honor, if I could add one more. As a basis for my motion of directed verdict, we move that there could be no slander of title because title was in the State of West Virginia and not Tug Fork Land Company at the time of the taking of the quit claim deed.

THE COURT: All right. That will be denied and overruled.

Now, there's a Defendant's Exhibit 27, which is an inter-office memo dated July 15th, 1985, which is admitted in by stipulation and agreement of counsel. That's Defendant's Exhibit No. 27.

Do you have your instructions? I'm ready to rule.

Let me tell you the changes I'm making in the charge. Under 4 on page 2, on the second line, I have stricken the word complaint and inserted the word counterclaim and on the third line I have stricken the word plaintiff and inserted the word defendants at the beginning of that third sentence. At the end [720] of the same sentence, I have stricken the word defendant and inserted the word plaintiff. On the third page at what is identified as No. 7, I have stricken the word his and inserted the word their.

On the very last page of the charge, the first paragraph that begins with the words, the same rules, in the second line, I have stricken the word past before damages and I have stricken the following paragraph in its entirety. Otherwise, I will give the charge as is. Are there any objections to it?

MR. MILLER: No objection.

THE COURT: Mr. Watson or Brumfield?

MR. WATSON: No objection.

THE COURT: All right. Defendant's Instruction No. 1? It will be given.

Do you have any objection, Mr. Miller?

MR. MILLER: No objection.

DEFENDANT'S INSTRUCTION NO. 1

In this case the defendants, Alliance Resources, Tug Fork, George King and Grover Goode seek damages against TXO Production Corporation, a Delaware Corporation licensed to do business in West Virginia. In cases of this type where damages are sought, it is commonly the party designated as the plaintiff who seeks an award of damages against a party designated as the defendant. In this case, however, the defendants seek an award of damages [721] against the plaintiff on their counterclaim against the plaintiff, TXO.

The law permits an award of money damages to the defendants under these circumstances if you find from the evidence in the case and the law as I instruct you that the defendants are entitled to your verdict.

For purposes of clarity, in the instructions I will give you in this case, I will refer to all of the defendants, Alliance Resources, Tug Fork, George King and Grover Goode, collectively simply as the defendants. I will refer to plaintiff TXO Production Corporation as the plaintiff, or simply as TXO.

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: Defendant's Instruction No. 2 will be given. Do you have any objection?

MR. MILLER: Your Honor, I have an objection. In the second full paragraph of No. 2, I don't have an objection to the second phrase after the comma indicated, is bound by facts admitted by its attorney in the course of litigation. I don't have an objection to that. I do have an objection to the first part where it says a corporation is likewise bound by the acts of an attorney retained by such corporation to handle its affairs. On the basis of our defense of reliance upon the advice of outside counsel, a distinction with outside or inside, I believe the [722] statement is correct as it relates to the internal counsel, who are the direct employees of TXO, but I believe we do have a defense of good faith in reliance upon the advice of outside counsel.

THE COURT: All right.

MR. WATSON: I think everything that the outside counsel did was also approved by inhouse counsel.

THE COURT: I'll give it over your objection as is.

DEFENDANT'S INSTRUCTION NO. 2

Since a corporation can act only through its officers, agents or employees, an act of an officer, employee or other agent of a corporation performed in the course of his or her duties on behalf of the corporation is held in law to be the act of the corporation itself. Therefore, a corporation is liable for the acts or omissions of its officers or employees or other agents if the act was performed in the course of their corporate duties.

A corporation is likewise bound by the acts of an attorney retained by such corporation to handle its affairs, and is bound by facts admitted by its attorney in the course of litigation.

Chesapeake & Ohio System Federation v. Hash, 294 S.E.2d 296 (W.Va. 1982)

Lisk v. Criswell, 52 Bankr. 184 (Bankr. E.D. Va. 1985)

2A M.J. Attorney and Client, §§ 17, 19;

18B Am. Jur.2d Corporations, § 1663.

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

[723] THE COURT: Did you withdraw a No. 3 or not offer it? I go to 4 on yours now. I don't have a No. 3.

MR. BRUMFIELD: Here is 3.

THE COURT: I'll give 3. Do you have an objection? This is one of their primary theories of the case. Do you have an objection?

MR. MILLER: Right, Your Honor. We'd state our objection for many of the reasons we've stated before as to an incorrect statement of the law as to a statement of the essential elements of a slander in title action and with respect to the special damages issue and malice, we believe those are also needed to be essential elements.

THE COURT: All right.

DEFENDANT'S INSTRUCTION NO. 3

The defendants in this case seek an award of money damages against TXO Production Corp. for slander of title to their property interests. Therefore, if you find that the defendants had a legally protected interest—such as ownership, lease or assignment—in the natural gas underlying the Blevins tract, and if you further find that TXO Production Corp., through its agents and employees, caused a quit claim deed to be recorded in the McDowell County court house conveying the said oil and gas to TXO Production Corp., with the intention to re-

duce the value of the defendants' property interest, or which TXO Production [724] Corp. recognized or should have recognized would reduce the value of defendants' property interest; and if you further find that TXO Production Corp. knew that the quit claim deed was false, or acted in reckless disregard of its truth or falsity, and that it was foreseeable that others would rely on said quit claim deed, and if you further find that defendants have suffered damages as a result of the said acts of TXO Production Corp., then the defendants have proved slander of title against TXO Production Corp. and are entitled to a verdict against TXO Production Corp.

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 4, Defendant's No. 4, is verbatim from my charge. Do you wish to withdraw it or just for me to refuse it?

MR. WATSON: We'll withdraw it, Your Honor.

THE COURT: I'm giving No. 5. Do you have any objection, Mr. Miller?

MR. MILLER: Your Honor, we have no objection to it other than as I stated before we believe that special damage will be required a compensatory damage award in this case.

MR. WATSON: Your Honor, we offered Defendant's Instruction No. 5 on that compensatory damage. We think your charge probably covers that, anyway, and so we'll withdraw No. 5.

THE COURT: All right. No. 5 is withdrawn.

[725] THE COURT: No. 6?

MR. MILLER: We object to the instruction on the basis that the evidence did not justify the giving of punitive damages instruction and we don't believe it should be submitted to the jury.

THE COURT: I've heard the evidence in this case and I am of the opinion that punitive damages will go to

the jury in this case and it will be so ordered. So the issue of punitive damages will go to the jury.

DEFENDANT'S INSTRUCTION NO. 6

In actions of tort, where gross fraud, malice, oppression or wanton, wilful or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive or vindictive damages.

Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895).

Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

Smith v. Perry, 359 S.E.2d 624 (W.Va. 1987).

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: All right. To recapitulate on the Defendant's Instructions, I'm going to give No. 1, No. 2, No. 3, and No. 6.

Now we can go to the plaintiff's instructions.

Plaintiff's Instruction No. 1.

MR. BRUMFIELD: No objection.

[726] PLAINTIFF'S INSTRUCTION No. 1

TXO has raised as a defense in this action that they acted in good faith and on the reliance of the advice of their attorneys that there existed a problem with the title to the property and that a quit claim should be obtained and a declaratory judgment action filed in order to clear the alleged title problem. If you believe from the evidence as a whole that the plaintiff TXO acted in good faith and in reliance upon the advice of their attorneys, then TXO cannot, as a matter of law, be liable to the defendants and you should render your verdict for the

plaintiff TXO and against the defendants.

Hurwitz v. Lotz, 172 La. 27, 133 So. 351 (1931); Noble v. Johnson, 180 Ok. 169, 68 P.2d 838 (1937).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 2?
MR. BRUMFIELD: No objection.

PLAINTIFF'S INSTRUCTION NO. 2

For you to render any judgment in favor of the defendants in this case, you must be satisfied by a preponderance of the evidence that the defendants have proven that the plaintiff TXO acted maliciously and without good faith in obtaining and recording the quit claim deed from Virginia Crews Coal Company.

In carrying this burden of proof the defendants must show [727] that TXO filed the quit claim deed with the intent to hurt the interest of the defendants, in other words "ill will."

Accordingly, unless you find that the defendants have proven by a preponderance of the evidence that TXO acted maliciously and without good faith and recorded the quit claim deed with an intent to hurt the defendants rather than to clear up the title, then you should render a verdict for the plaintiff TXO and against the defendants.

Cardon v. McConnell, 120 N.C. 461, 27 S.E. 109 (1897); Noble v. Johnson, 180 Okla. 169, 68 P.2d 838 (1937); Hurwitz v. Lotz, 172 La. 27, 133 So. 351 (1931); Allison v. Berry, 316 Ill. App. 261, 44 N.E.2d 934, 929 (1937); Briggs v. Coykendall, 57 N.D. 785, 224 N.W. 202 (1929).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 3?
MR. BRUMFIELD: We object.
THE COURT: Will be refused.

PLAINTIFF'S INSTRUCTION NO. 3

For each of the defendants to prevail in this case they must each prove, as one element of their action, they suffered special damage as a result of the alleged wrongful and malicious recording of a quit claim deed.

To suffer "special damages" means that each defendant must show that they suffered a particular loss, such as, a prospective purchaser of any lease or property interest they may have had in [728] the property. It is not sufficient for the defendants to merely offer proof that the lease may have been worth more per acre or that they intended or considered selling to another person who might buy. They must prove by a preponderance of the evidence that there was a loss of a particular sale to a particular person and that that sale did not go forward as a direct and proximate result of the alleged wrongful acts by the plaintiff. The damage must be as a result of the slander of title and not other factors to be recoverable.

Accordingly, unless you find by a preponderance of the evidence that a defendant has proven that they suffered special damage as a result of the alleged slander of title, then you should render your verdict in favor of the plaintiff TXO and against any such defendants.

Carrol v. Warner Bros. Pictures, 20 F.Supp. 405, 408 (So. Dist. NY 1937); International Visible Systems Corp. v. Remington-Rand, Inc., 65 F.2d 540, 542 (6th Cir. 1933); Berryman v. Sinclair Prairie Oil Co., 164 F.2d 734, 737 (10th Cir. 1948); Restatement (Second) of Torts §§ 128 and 651 (4th Ed. 1971); Hubbard v. Scott, 85 Or. 1, 12-13, 166 P.33, 36 (1917).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 4 is in my charge, really. Maybe not in those terms, though. And reasonable degree of certainty, I always thought that was for future damages.

MR. MILLER: Your Honor, I'll withdrawn No. 4.

[729] THE COURT: No. 5? I'm going to refuse this because you're saying attorney fees shouldn't be and I'm saying I think the state of the law says it is.

PLAINTIFF'S INSTRUCTION NO. 5

In considering whether the defendants have suffered any special damages, you should not consider any attorneys fees or costs they may have incurred in defending the declaratory judgment action as a "special damage". Attorneys fees are not special damages and therefore are not recoverable under a slander of title action.

Barquin v. Hall Oil Co., 28 Wyo. 164, 167, 201 P. 352, 354 (1921); City of Shrevesport v. Kahn, 194 La. 55, 67, 193 So. 461, 465 (1939).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 6?
MR. BRUMFIELD: No objection.
THE COURT: Looks okay.

PLAINTIFF'S INSTRUCTION NO. 6

The Court instructs the jury that in order for the defendants to obtain any verdict against TXO they must prove by a preponderance of the evidence that the plaintiff TXO acted with malice when they obtained and recorded the quit claim deed. There is no presumption of malice and the burden rests upon the defendants to prove lack of good faith. Malice is defined as an act or acts [730] undertaken with a direct intention to injure another party, or in a reckless disregard of the other

parties' rights and as a consequence of which the other party is injured.

Briggs v. Coykendall, 57 N.D. 785, 790, 224 N.W. 202, 205 (1929); Allison v. Berry, 316 Il. App. 261, 272, 44 N.E.2d 929 (1937).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 7? That will be refused. You're claiming actual malice and I'm relying on the Wells case which indicates to me that it just has to be malice rather than actual malice.

PLAINTIFF'S INSTRUCTION NO. 7

The defendants are not entitled to receive an award of punitive damage unless you the jury find, by a preponderance of the evidence, that the plaintiff TXO acted with "actual malice" in the recording of the quit claim deed and the filing of a declaratory judgment action.

Actual malice means ill will, spite, evil motive or such reckless disregard for the rights of others as to amount to a wilful or wanton act of harm. In other words, you must believe by a preponderance of the evidence that the plaintiff TXO acted with positive desire and intention to annoy and injure the property rights, if any, of the defendants before you can award any punitive damages.

Kidd v. Hossett, 331 S.W.2d 515, 518 (Tex. Civ. App. 1960); [731] Walker v. Ruggles, 540 S.W.2d 470, 474 (Tex. Civ. App. 1976) rev'd on other grounds, 632 S.W.2d 145 (1982); Proctor v. Gissendaner, 579 F.2d 876, 833 (5th Cir. 1978); Kidd v. Burten, 407 F.2d 204, 207 (6th Cir. 1969).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 8? No. 8?

MR. BRUMFIELD: We object to 8 for the same reason—it states actual malice.

THE COURT: I see. That's refused.

PLAINTIFF'S INSTRUCTION No. 8

The Court instructs the jury that a party acting in good faith reliance upon the advice of their attorneys may be a defense to a slander of title action. You are further instructed that in consideration of the punitive damage claim by the defendants, that if you believe by a preponderance of the evidence that the plaintiff TXO acted in good faith upon the reliance of counsel then they could not, as a matter of law, have acted with actual malice and you should return your verdict with respect to the issue of punitive damages in favor of the plaintiff TXO and against the defendants.

Kidd v. Burten, 407 F.2d 204, 207 (6th Cir. 1969).

OBJECTION—REFUSED—EXCEPTION

/s/ Booker T. Stephens, Judge

THE COURT: No. 9?

[732] MR. BRUMFIELD: No objection.

PLAINTIFF'S INSTRUCTION NO. 9

The Court instructs you that the burden of proof in this case is upon the defendants. In other words, unless you believe that the defendants have proven by a preponderance of the evidence each and every element of their claim, then you should not render a judgment in favor of the defendants, but should render your verdict in favor of the plaintiff TXO.

To find something by a preponderance of the evidence means to find, based upon the evidence presented to you, that something is more likely so than not so.

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: No. 10?

MR. BRUMFIELD: No objection.

THE COURT: Is okay.

PLAINTIFF'S INSTRUCTION NO. 10

Under West Virginia law, any party to a contract or a dispute may file a law suit called a declaratory judgment law suit to ask that a court of law adjudicate the dispute and tell the parties who, for example, is correct and who is wrong.

The Court instructs the jury that the spirit and purpose of the declaratory judgment act (W. Va. Code § 55-13-1 *et. seq.*) is to anticipate the actual accrual of causes for equitable relief [733] or rights of action, by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved.

Therefore, if you believe from a preponderance of the evidence that TXO in good faith believed the Tug Fork—Signaigo deed was ambiguous as to oil and gas ownership and reservation and that the acquisition of the quit claim deed and filing of the declaratory judgment action against Tug Fork and the other defendants was intended to clear title and determine and adjudicate the parties' rights, responsibilities and duties as to such title, then TXO was warranted in its action and you should find for TXO and against the defendants.

West Virginia—Pittsburgh Coal Co. v. Strong, 129 W.Va. 832, 42 S.E.2d 46 (1974); Board of Educ. v. Board of Public Works, 144 W. Va. 593, 109 S.E.2d 552 (1959); Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 883 (1960).

NO OBJECTION—GIVEN

/s/ Booker T. Stephens, Judge

THE COURT: To recapitulate for the plaintiff's instructions, I'm going to give No. 1, No. 2, No. 6, No. 9 and No. 10.

I took the liberty last night to take it upon my own to work out a punitive damage instruction. I wasn't so sure we had done enough in that area since I was going to let it go to the jury. I want you to look at this, both sides, and see if maybe that's not needed and if you tell me it's not, I'll agree [734] with you. If you tell me it is, I will agree with you. But it just seemed to be lacking with what we've got.

MR. BRUMFIELD: Judge, from the standpoint of the defendants, we like the language of the instructions and it does follow—We also note the Court is correct about it and there is one phrase that we have a problem with and—

THE COURT: I won't change anything. I want to give it as it is because I think the Supreme Court didn't say it wasn't bad, so that means it's good. So if you're objecting to it, and, you know, I'm not trying to push it on you. I don't want you to pacify me and say, Judge, oh, it's beautiful language. It's not my instruction. Somebody-else did that.

MR. BRUMFIELD: We object to it.

THE COURT: Okay. Well, it just won't be given.

MR. MILLER: Your Honor, I'd like to, if you will permit me to, offer it as a Plaintiff's Instruction. No. 11.

THE COURT: I'll give it over their objection if you offer it.

THE COURT: All right.

MR. WATSON: Your Honor, we'd like to state the basis of our objection.

THE COURT: Go ahead and put your objection on the record.

MR. WATSON: Your Honor, the language to which we had some reservation is that language that states that there's a reasonable [735] proportion requirement and it's our understanding that under the case of Wells

versus Smith that that is contrary to that portion of the instruction. I realize that Berry is a later case than the Wells case is and I don't know what's happened.

THE COURT: Well, your objection is noted.

Will you write on here Plaintiff's No. 11 for me?

MR. MILLER: Yes, Your Honor.

Thereupon it was agreed that each side would have 45 minutes for arguments.

MR. MILLER: Your Honor, if I can, I'm going to ask to modify the language.

THE COURT: It won't be given. Let's just not give it.

MR. MILLER: All right. We'll just drop it then?

THE COURT: Right. Did you hear what's taken place? This is not given now. He wanted to modify the language and I wasn't going to allow that. So it's not given at all.

All right. Bring the jury out.

Thereupon at 11:03 a.m. the jury came into the court room and the proceedings were before the Court and the jury as follows:

THE COURT: Okay. It's almost eleven o'clock. Maybe it is eleven o'clock. I'll let you go to lunch. Be back at 12:15 in the jury room 12:15 today. You're still not to discuss this case among yourselves or with anyone else. You're not to read, [736] view or listen to any news accounts of this case, if there be any. When you return from lunch, do not linger downstairs but just come up and go directly into the jury room and we'll call you out. Have a nice lunch.

Thereupon at 11:04 a.m. the jury left for lunch and there was a recess from the proceedings until 12:15 p.m.

The proceedings continued before the Court as follows:

THE COURT: Mr. Watson, did you have a statement to make?

MR. WATSON: Your Honor, the defendants would like to withdraw an instruction offered as Defendant's

Instruction No. 6 and substitute therefor Instruction 6A on punitive damages, which we think is a more complete instruction.

THE COURT: Any objection?

MR. MILLER: Your Honor, my objection would be in paragraph No. 1 the use of the phrase outrageous conduct and in paragraph No. 3, it makes reference to the wealth of the perpetrator. I believe those terms would inflame the jury and would mislead the jury and therefore we object to the instruction.

MR. BRUMFIELD: We'll withdraw outrageous in the first paragraph if you want.

THE COURT: All right. It will be given over his objection with the amendment of outrageous being stricken.

DEFENDANT'S INSTRUCTION No. 6A

[737] In addition to actual or compensatory damages, the law permits the jury, under certain circumstances, to make an award of punitive damages, in order to punish the wrongdoer for his misconduct, to serve as an example or warning to others not to engage in such conduct and to provide additional compensation for the conduct to which the injured parties have been subjected.

If you find from a preponderance of the evidence that TXO Production Corp. is guilty of wanton, wilful, malicious or reckless conduct which shows an indifference to the right of others, then you may make an award of punitive damages in this case.

In assessing punitive damages, if any, you should take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore the law recognizes that to in fact deter

such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

Leach v. Biscayne Oil and Gas Co., Inc., 289 S.E.2d 197 [738] (W.Va. 1982); Harless v. First National Bank in Fairmont, 289 S.E.2d 692 (W.Va. 1982); Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

OBJECTION—GIVEN—EXCEPTION

/s/ Booker T. Stephens, Judge

Whereupon at 11:02 a.m. a recess was taken until 12:15 p.m. of the same day.

AFTERNOON SESSION

The trial was resumed at 12:15 p.m. pursuant to the noon recess, there being present the same parties as heretofore noted.

The proceedings continued before the Court and the jury after the jury had returned into the court room as follows:

THE COURT: Ladies and gentlemen of the jury, we're now at the stage of these proceedings whereby I will instruct you on the law as it applies to this case and I ask that you pay close attention as I do so.

It is your duty as jurors to follow the law as stated in my instructions and to apply the rules of law to the facts as you find them from the evidence in this case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty [739] to base a verdict upon any other view of the law than that given in the instructions of the Court, just as it would be

a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in this case.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the counterclaim of the defendants and the defenses raised by the answer of the plaintiff. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion.

Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences. This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

Although the burden is on the party who asserts the affirmative of an issue to prove their claim by a preponderance of the evidence in the case, this rules does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

[740] To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proven by a preponderance of the evidence in the case, you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence regardless of who may have produced them. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence; but which witnesses and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The functions of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So while you should consider only the evidence in the case, [741] you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eye witness. The other is indirect or circumstantial evidence—proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, all exhibits received in evidence and the stipulations of counsel.

If any references by the Court or by counsel to matters of evidence do not coincide with your recollection, it is

your recollection which should control during your deliberations.

So, again, you are to consider only the evidence in the case. But in your consideration of the evidence, you are not [742] limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as witnesses testify. You are permitted to draw, from the facts which you find have been proven, such reasonable inferences as you feel are justified in the light of experience and common sense.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been otherwise established by the evidence in the case.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witnesses (sic) intelligence, motive and state of mind and demeanor and manner while on the stand. Consider the witnesses (sic) ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relationship which each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. It is your duty to determine from all of the testimony taken, and all of the circumstances surrounding this case, which witnesses [743] have testified truthfully and which ones, if any, have testified falsely. Certainly the Court does not mean to infer or suggest that any witness who has appeared before you has testified falsely or untruthfully. However, it will be a matter for you to determine which testimony is more satisfactory to you, and naturally, you may take into

consideration the opportunity of each witness to observe and to know the facts concerning which his or her testimony was given.

However, if you believe that any witness has knowingly and intentionally testified falsely as to any material fact, you have the right to disregard all of the testimony of such witness so testifying falsely, or to give his or her testimony, or any part thereof, such weight only as the same, in your opinion, may be entitled to receive.

Inconsistencies or discrepancies in the testimony of a witness or between or among the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently—an innocent misrecollection like failure of recollection is not an uncommon experience. So in weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

Expert witnesses. The rules of evidence provide that if [744] scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received into evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard that opinion entirely. On the other hand, if you should decide that an expert's opinion is based upon sufficient education or experience, then you may accept the opinion totally, or some part of it.

The Court instructs the jury that in considering and weighing the testimony of experts in this case, it is your duty also to consider and weigh the same in connection with all the other evidence in the case and all facts and circumstances established by the preponderance of the evidence, and you should apply sound judgment to the sifting and weighing of the evidence in order to reach a verdict.

In answering all questions in the verdict, if you find, after discussing the testimony and all other evidence which bears [745] upon a particular question, that the evidence is uncertain or inadequate to the point where you have to guess what the answer should be, then the party having the burden of proof as to the question or questions has not met the required burden of proof. Answers may not be based on guesswork or speculation. Your answers must be based upon evidence that you believe, evidence from which you can conclude or infer the existence of the facts which the party must prove in order to satisfy the burden of proof as to the question under consideration.

The same rules apply to the damage questions in the verdict. The party asking for damages has the burden of producing evidence by a preponderance of the evidence that the damages being alleged have been suffered.

Damages may not be based upon guesswork or speculation, but rather must be supported by evidence which satisfies your minds that the damages being awarded represent just and reasonable compensation for the particular item of damage under consideration.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the [746] evidence in the case with your fellow jurors.

* * * *

[783] THE COURT: Ladies and gentlemen of the jury, we're now at the stage of these proceedings whereby you will retire to the jury room and begin your deliberations on your verdict. The very first thing you do when you retire to the jury room is to choose one of you as the foreman of the jury. The very first thing you do when you retire to the jury room, before you do anything else, is to choose one of you as the foreman of the jury. After you have chosen a foreman of the jury, then you will have open and free discussion and deliberation on your verdict. We have form verdicts that we will provide to you. You can either find for the defendants and on the defendants' verdict, they're listed one, two, three and out from their name is a dollar sign and a line. You will have to fill that in. That is if you find for the defendants. Also, there is a section on here for punitive damages. That's your decision, to either find punitive damages or not to find punitive damages. If you find punitive damages, there's a dollar sign there. You must fill in that blank. There's also a verdict form here whereby you can find for [784] the plaintiff and against the defendants.

Now, after you have reached your verdict, at the bottom of the verdict form is a line and under that line is the word, foreperson. Whoever is chosen as the foreperson of the jury and I had mentioned foreman of the jury. That means the same thing. Whoever is the foreperson of the jury will sign the verdict form that all of you agree on. Then you will knock on the door and I will bring you out and announce what your verdict is. Now, if I don't hear you knock on the door, you will be in that room throughout eternity.

Now, you may retire and begin your deliberation.

* * * *

EDITOR'S NOTE

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No. 92-179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

2. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S.Ct. 1032, 1043 (1991), violated TXO's procedural due process rights.

PARTIES TO THE PROCEEDINGS

Petitioner TXO Production Corp. has been merged into Marathon Oil Company.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that its parent company is USX Corp.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet. App. 1a-52a) is reported at 419 S.E.2d 870 (W.Va. 1992). The separately filed concurrence of McHugh, C.J., of the Supreme Court of Appeals of West Virginia (Pet. App. 53a-54a) is reported at 419 S.E.2d 870, 895-96. The ruling of the Supreme Court of Appeals of West Virginia on the petition for rehearing (Pet. App. 77a) is not reported. The ruling of the Circuit Court of McDowell County, West Virginia, on petitioner's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, or, in the alternative, for remittitur, is not reported. The transcript of the proceeding on that motion is included in the Appendix to the Petition (Pet. App. 55a-74a), as is the court's written order (Pet. App. 75a-76a).

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on May 14, 1992. The petition for rehearing was denied on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of . . . property without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

A. The Underlying Title Dispute.

Petitioner TXO Production Corp. ("TXO") was an oil and gas production company that, at the time relevant to this dispute, did business in 25 states, including a small

operation it conducted in West Virginia.[1] In the summer of 1984, TXO sought to lease a tract of land in McDowell County, West Virginia, known as the "Blevins tract," for purposes of oil and gas exploration and production. Pet. App. 7a-8a. Respondent Tug Fork Land Company ("Tug Fork") held title to the oil and gas underlying the tract and had leased the oil and gas development rights to respondent George King. King, in turn, had assigned the lease to respondent Alliance Resources Corporation ("Alliance").[2] *Id.* In 1985, TXO and Alliance signed an agreement under which TXO would pay Alliance $20 per acre for its interest in the Blevins tract; Alliance would assign to TXO its full title and interest in the lease, reserving a royalty interest; and Alliance would reimburse TXO the consideration paid for the lease if TXO determined through title examination that title had failed as to all or any part of the leased premises. Pet. App. 8a-9a n.1.

Prior to drilling a well, TXO retained a West Virginia law firm to perform a title examination. Pet. App. 9a. TXO's attorneys opined that title was not clear, because in a 1958 deed, Tug Fork appeared to have conveyed to Leo J. Signaigo, Jr., the oil and gas rights to the Blevins tract, and that those rights were now held by Signaigo's successor in interest, Virginia Crews Coal Company ("Virginia Crews").[3] Pet. App. 9a; Tr. 388-90, 409-12.

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[1] TXO was acquired by USX Corporation in 1986. In 1990, TXO was merged into Marathon Oil Company, a wholly owned subsidiary of USX Corporation.

[2] The assignment by King to Alliance reserved a royalty interest to King and King's attorney, respondent Grover C. Goode. Tr. 565-66.

[3] In reaching this conclusion, counsel relied upon the language in the 1958 mineral deed to Signaigo, the non-assessment of any taxes on the mineral estate to Tug Fork and its successors, and importantly, the assessment and payment of taxes on the mineral estate by Virginia Crews and its predecessors in interest. *See* Rec. 1591, 1605, 1611-12 (Pl. Ex. 3).

The record in the Supreme Court of Appeals of West Virginia is cited herein as "Rec." The trial transcript begins at page 2177 of that record. The page numbers of the trial transcript are referenced as "Tr. ——"; they are not otherwise paginated in the record.

TXO's attorneys also were troubled by the fact that since 1958, Tug Fork had not been taxed by the State on the oil, gas, or coal in the Blevins tract. Rec. 1589 (Pl. Ex. 2).

TXO was unwilling to invest the more-than $200,000 necessary to drill an oil and gas well on the property until it had cleared any potential cloud on the title and was confident of its right to extract the oil and gas. See Pet. App. 12a. Based on its attorneys' advice, therefore, TXO obtained and recorded a quitclaim deed in which TXO was granted whatever rights Virginia Crews might have to the oil and gas rights in the property. Pet. App. 11a.

Thereafter, TXO called a meeting with Alliance to discuss TXO's title concerns. The parties were unable to reach any agreement, and shortly after that meeting, on August 23, 1985, TXO filed its complaint in the Circuit Court of McDowell County, West Virginia, for declaratory judgment to quiet title. Pet. App. 12a. Respondents counterclaimed for slander of title, alleging that the 1958 deed was unambiguous in reserving the entire oil and gas estate to Tug Fork and its assignees, that TXO had acted in bad faith by recording the quitclaim deed, and that TXO had done so to put a spurious cloud on the title in order to obtain royalty concessions from respondents.

B. Proceedings Below.

The action to quiet title and the counterclaim for slander of title were bifurcated. The quiet-title action was heard by the court on December 17, 1987. Without taking any evidence, the court ruled that title to the oil and gas estate was vested in Tug Fork, and that title to the coal rights only had been transferred to Virginia Crews. Pet. App. 12a; Rec. 691-722.

In June of 1990, the counterclaim for slander of title was tried before a jury. Over TXO's objections, respondents relied upon hearsay testimony of unrelated "other acts" of TXO. Pet. App. 21a-24a. Four attorneys from Louisiana, Oklahoma, and Texas were permitted to give their opinions concerning TXO's conduct in other cases that were wholly unrelated to the participants, facts, or underlying cause of action in the case at bar.[4] None of those cases even involved a claim for slander of title. *Id.* at 21a-24a. The trial court admitted this testimony under West Virginia's "catch-all" exception to the hearsay rule. *Id.* at 30a-32a.

In the first West Virginia case ever to recognize a cause of action for slander of title, the jury found for respondents, and awarded $19,000 to compensate them for their attorney's fees incurred in defending the quiet-title action brought by TXO. Pet. App. 12a, 20a. The jury's award indicated that there was no actual damages to respondents' property rights or to their ability to sell or lease the property, which are the usual measures of damage in slander of title actions. *Id.* The jury also awarded $10 million in punitive damages against TXO, an amount approximately 526 times the compensatory award.

TXO moved for judgment notwithstanding the verdict or, in the alternative, for remittitur, based, *inter alia*, upon the excessiveness and disproportionality of the punitive award and the absence of meaningful standards for the jury and the trial court. Pet. App. 55a-69a. The court, without any explanation, denied the post-trial motions from the bench. *Id.* at 72a.

The West Virginia Supreme Court affirmed. First, it rejected TXO's argument that TXO had been denied due process because it was not afforded the procedural safeguards approved in this Court's decision in *Pacific Mutual*

[4] The cases about which testimony was heard had either been settled or were still pending at the time this case was tried. One of the pending cases was subsequently tried, and a jury returned a verdict for TXO. Pet. App. 28a.

Life Insurance Co. v. *Haslip*, 111 S. Ct. 1032 (1991), and applied by the West Virginia Supreme Court itself in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991) (on remand from the United States Supreme Court, 111 S. Ct. 2882 (1991)).[5] Pet. App. 7a, 32a. Second, the West Virginia court rejected TXO's argument that TXO had been denied due process because the punitive damages award was unconstitutionally excessive. *Id.* at 40a.

In *Garnes*, the West Virginia Supreme Court, "following the dictates of *Haslip*," had set out detailed procedures—similar to Alabama's punitive damages scheme approved in *Haslip*—for awarding punitive damages in compliance with the requirements of due process. *Garnes*, 413 S.E.2d at 908. These procedures were designed to provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review." 413 S.E.2d at 908. Under this new system, a West Virginia trial court is required, at a minimum, to explain five specific criteria to the jury for use in determining the appropriateness and size of a punitive award. Pet. App. 33a-34a (citing *Garnes*, 413 S.E.2d at 908-09). These same factors, plus four others, are to be taken into consideration by the trial court upon its review of the award. Pet. App. 34a (citing *id.* at 909). Finally, the West Virginia Supreme Court's review of a punitive damages award must be based upon the same factors. *Garnes*, 413 S.E.2d at 910.

The West Virginia Supreme Court acknowledged that it had "set out [the *Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*." Pet. App. 35a. The court denied those fundamental due process protections to TXO, however, declaring that to

[5] Both *Haslip* and *Garnes* were decided after TXO's *j.n.o.v.* motion had been ruled upon.

remand cases that were on appeal when *Garnes* was decided would "unnecessaryly send far too many cases back for retrial." Pet. App. 32a.

The West Virginia Supreme Court then undertook to review the punitive award under its newly minted "broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages." *Id.* at 35a. The court explained these new guidelines by stating:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

Id. at 36a, 51a-52a. The court then pronounced that "[i]n cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is *roughly* five to one." *Id.* at 38a. By contrast, under West Virginia's new "test," "[w]here the defendant is not just stupid, but really mean . . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*." *Id.* at 39a.

The West Virginia Supreme Court characterized TXO's actions as a bad-faith attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights." *Id.* at 11a-12a. Reasoning that the large award itself demonstrated that TXO had been "really mean," rather than "really stupid," the West Virginia Supreme Court concluded that the $10 million award against TXO did not violate due process, and affirmed the judgment. *Id.* at 40a, 42a.

SUMMARY OF ARGUMENT

In 1991, this Court expressed its "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043. This is that case—the

award of $10 million is grossly excessive and is the product of a system devoid of meaningful procedural constraints. The punitive award therefore violates both the substantive and procedural limitations that inhere in the Due Process Clause of the Fourteenth Amendment.

I.

It is well established that the Fourteenth Amendment's guarantee of fundamental fairness includes substantive limits beyond which penalties may not go. *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907). Punishment is not an end in itself, but rather a means of achieving social goals such as retribution and deterrence, and when a penalty far exceeds any amount rationally necessary to further a State's legitimate policy goals, it is by definition an arbitrary confiscation of property. Although this constitutional guarantee of due process applies to all state action, more rigorous due process review is warranted when the penalty is not imposed through general legislation, which embodies the powerful protections against arbitrariness afforded by democratic processes. Indeed, the danger of arbitrary government action is at its zenith when an unaccountable and unguided jury, exercising near-absolute discretion, awards punitive damages. Only meaningful due process review can, as the Fourteenth Amendment demands, adequately secure the individual from the arbitrary exercise of the powers of government. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909).

A. The $10 million punitive award imposed against TXO does not meet even the most minimal standards of fundamental fairness. That award bears no understandable relationship to compensatory damages or to the seriousness of petitioner's offense. *Haslip*, 111 S. Ct. at 1045. Despite the fact that petitioner's actions threatened only financial harm in a purely commercial setting, the challenged award is 20 times larger than any punitive damages award ever before upheld in West Virginia for any misconduct. And the award is more than ten times the

highest punitive award imposed in those extremely rare cases in which *any* punitive award was deemed appropriate for slander of title. The punitive damages in this case also far exceed any contemporary or historical legislatively determined penalty for similar conduct. Finally, the punitive damages awarded by the jury are 526 times greater than the compensatory award. Contrast *Haslip*, 111 S. Ct. at 1046 (punitive award of four times compensatory damages "was close to the [constitutional] line"). Where a jury-imposed penalty exceeds the bounds of fair play and decency established by contemporary and historical practice by *orders of magnitude*, absent a compelling and particularized justification, the jury verdict must be deemed arbitrary and excessive, and therefore a deprivation of property without due process of law.

B. There is no plausible argument that such an extraordinary penalty was necessary to meet West Virginia's legitimate goals. The only real justification offered by the court below for the staggering penalty assessed against TXO was the size of its corporate shareholder's "pocketbook." Of course, as this Court recognized in *Haslip*, large punitive awards cannot, consistent with due process, be justified on such a "deep pocket" theory. 111 S. Ct. at 1045.

Nor can the enormous size of the challenged award rationally be explained as necessary to further West Virginia's traditional goals in assessing punitive damages: retribution and deterrence. Viewed in light of the limiting principles embodied in West Virginia's chosen penal theories and all relevant objective indicia of rationality, it is patent that the $10 million award assessed against TXO greatly exceeds any amount that might fairly serve to punish TXO or to provide a permissible level of deterrence. At bottom, the extraordinary penalty assessed against TXO passes far beyond the bounds of reason and assumes the character of merely arbitrary fiat; it therefore violates the substantive limits of due process, and should be reversed.

II.

A. The $10 million punitive award was made and approved under procedures that violate due process. In *Haslip*, this Court left no doubt that due process requires States to provide procedural protections to ensure a "significantly definite and meaningful constraint on the discretion of . . . fact finders in awarding punitive damages." 111 S. Ct. at 1045. In *Haslip*, the jury's "significant discretion was appropriately constrained by jury instructions and the two levels of judicial review undertaken by the state courts in that case. *Id.* at 1044-45. The procedure in this case falls far short of that provided by Alabama and approved by this Court in *Haslip*.

Here, the jury instructions did not provide guidance to the jury so that it could determine rationally the amount of punitive damages appropriate to further state goals. Instead, the jury was instructed specifically to base the amount of the punitive award on the wealth of TXO and its corporate affiliates. Because the sole concrete guidance the jury received in this endeavor was only barely, if at all, relevant, and was inherently prejudicial, the resulting award is unconstitutional.

Moreover, the arbitrariness of the punitive award was aggravated by the broad invitation given to the jury to award some undefined "additional compensation" to respondents. This instruction amounted to nothing more than an appeal to the jury simply to redistribute wealth from a large out-of-state corporation to resident litigants, which is plainly improper. *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 350 (1935).

Nor was the jury's award subjected to meaningful judicial review at either the trial-court or appellate level. Unlike the procedure in *Haslip*, here there were no preestablished criteria to guide review of jury-made punitive awards. Moreover, in *Haslip*, the trial court was required to make its findings on the record; by contrast, here, the trial court summarily denied TXO's challenge to the constitutionality of the award.

The "review" conducted by the West Virginia Supreme Court did nothing to eliminate the arbitrariness of the excessive award against TXO. Far from applying objective criteria, and carefully comparing the award to other awards and fines for similar conduct—steps approved by this Court in *Haslip*—the West Virginia court declared that where a punitive damages defendant was deemed to be "really mean," there is effectively no limit whatsoever on the magnitude of a punitive award. The court then held that in this case, the size of the award itself was enough to demonstrate that TXO was "really mean." Thus, the West Virginia Supreme Court approved the $10 million award against TXO on a basis that provides no meaningful constraint on an excessive award of punitive damages.

B. The procedure that was applied in this case not only failed to meet the *Haslip* standard, but also it was unconstitutionally vague. Clarity is especially important where, as here, a jury is making an award intended to serve as punishment, and not as compensation for injury, and such clarity is noticeably absent from West Virginia's punitive damages scheme. That scheme is contrary to all three related goals of the void-for-vagueness doctrine: to ensure that laws are sufficiently understandable to provide adequate notice of potential penalties; to establish clear guidelines that prevent juries from merely pursuing their personal predilections; and to permit meaningful judicial review. The lack of notice was particularly flagrant in this case, because TXO was assessed $10 million in punitive damages for a tort that had not been previously recognized in West Virgina.

ARGUMENT

Two Terms ago, this Court undertook to provide some guidance as to how punitive damages awarded by a jury should be scrutinized in a challenge under the Due Process Clause of the Fourteenth Amendment. The starting point for the Court's analysis was its recognition that "unlimited jury discretion—or unlimited judicial discretion for

that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991).

In *Haslip*, the procedural protections under Alabama law incorporated significant substantive elements, which had been applied to the defendant in that case. In particular, the Court identified the jury instructions and searching trial-court and appellate review guided by preestablished criteria as containing, in conjunction, significant protections to ensure against "extreme results" in a specific case. Because in *Haslip* those protections had kept the magnitude of the award within reasonable bounds, even if only barely, 111 S. Ct. at 1046, and because they had had "real effect" in other cases, *id.* at 1045, the Court affirmed the punitive award without deciding precisely what substantive limits the Fourteenth Amendment places on punitive damages.

The premise that procedural protections, if implemented with proper substantive requirements, will eliminate the need to set standards directly on the size of punitive awards under the Fourteenth Amendment is, in light of lower court decisions in the wake of *Haslip*, doubtful.[6] In this case, the West Virginia courts were completely unfaithful to the procedural mandate of the Court in *Haslip*. Moreover, the West Virginia Supreme Court chose to apply a form of appellate review that incorporated a substantive standard—unlimited awards for "really mean" defendants—that ensures that an extreme penalty imposed by the jury will go unchecked. Accordingly, the award in this case, because of its magnitude and because of the standardless method by which it was imposed, violates both the substantive and the procedural components of due process.

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[6] *See, e.g.*, Brief of Phillips Petroleum Co., *et al.*, as *amici curiae*, (citing cases demonstrating that courts have ignored *Haslip* and evaded this Court's mandate), and Brief of The Business Council of Alabama as *amicus curiae* (citing post-*Haslip* cases in Alabama to the same effect).

I. THE $10 MILLION PUNITIVE AWARD ASSESSED AGAINST TXO IS SO GROSSLY EXCESSIVE THAT IT CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Regardless of what procedures are mandated by the Fourteenth Amendment, there are also substantive constitutional limits "beyond which penalties may not go." *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907). See also *St. Louis Iron Mountain & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919) ("That [the Fourteenth Amendment] places a limitation upon the powers of the States to prescribe penalties for violations of their laws has been fully recognized"); *Standard Oil Co.* v. *Missouri*, 224 U.S. 270, 286 (1912) (due process guarantees that courts may "no more assess excessive damages than . . . impose excessive fines"). Accordingly, this Court for nearly a century has carefully scrutinized extra-compensatory penalties to ensure that they are not "so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). In *Southwestern Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915), for example, this Court reversed a $500 penalty for conduct that caused only $2 in actual harm, because that penalty "depart[ed] from the fundamental principles of justice embraced in the recognized conception of due process of law . . . [and] was so plainly arbitrary and oppressive as to be nothing short of a taking of [the defendant's] property without due process of law." *Id.* at 490-91.

Punitive damage awards—"quasi-criminal" penalties[7] imposed without the basic protections available in other penal contexts—should not be immune from rigorous judicial review. Unlike the *legislative* policy determinations reviewed, and in several cases invalidated, in this

[7] *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). *See also Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) ("The Court's cases abound with the recognition of the penal nature of punitive damages").

Court's earlier due process penalty decisions, jury awards of punitive damages typically are assessed without any legislative guidance. Thus, this Court's understandable reluctance to scrutinize under the Due Process Clause state *legislation* regulating business does not offer a proper model for reviewing individual jury awards. Deferential review of "economic" legislation does not rest on any general dissatisfaction with the ancient and unassailable doctrine that citizens are entitled to reasonable protections against arbitrary and irrational government action. Rather, its basis is the broader respect for democratic process and the institutional competency of the elected representatives of the States' citizens.[8] Where the State acts through legislation of general applicability, the State's important policy judgments—often having far-reaching effects on individuals—are made by those who have official responsibility for such policy decisions. This Court's modern due process decisions recognize that this democratic process usually provides adequate protection against the arbitrary exercise of government power.

Review of the punitive damages award challenged here, by contrast, requires no second-guessing of any legislative policy choice.[9] No democratic checks on the arbitrary

[8] *See, e.g., City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of *legislative* policy determinations") (emphasis added); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("For protection against abuses by legislatures the people must resort to the polls, not the courts") (citation omitted).

[9] Indeed, because the jury in this case was given no meaningful guidance concerning how to further West Virginia's goals, *see infra* pp. 34-39, heightened due process review here does not even require second-guessing of a jury. And West Virginia's highest court, far from raising concern over interference with its punitive damage decisions, has expressly recognized that due process limits on punitive damage awards should be treated in a nationally uniform fashion. *See Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 905 (W.Va. 1991) ("We believe that the U.S. Supreme Court's adoption of punitive damages standards is a major step in the unification of America's decisional law in matters where the separate states are unable to craft a set of rational rules").

exercise of government power were involved here, and there was accordingly nothing to which a court properly could defer. See *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring) ("our scrutiny of awards made without the benefit of a legislature's deliberation and guidance [sh]ould be less indulgent than our consideration of those that fall within statutory limits"). Neither the citizens of West Virginia nor their elected representatives ever determined as a matter of state policy that $10 million could be a fitting punishment for slandering title, or that a sum even approaching that amount was appropriate to serve West Virginia's legitimate goals. To the contrary, TXO's punishment was meted out by a single jury, exercising near-absolute discretion. So long as West Virginia and other States leave to juries the task of implementing their penal goals on an *ad hoc* basis, only the continued availability of meaningful due process review can, as the Due Process Clause requires, "secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado* v. *California*, 110 U.S. 516, 527 (1884)).

It is therefore unsurprising that this Court, acting on its "concern about punitive damages 'run wild,'" *Haslip*, 111 S. Ct. at 1043, confirmed that there are limits beyond which punitive damage awards may not go. *Id.* ("general concerns of reasonableness . . . properly enter into the constitutional calculus"). Of course, even before *Haslip*, "it [was] not disputed that a jury award may not be upheld if it was the product of bias or passion." *Browning-Ferris*, 492 U.S. at 276. This Court recognized in *Haslip* that where a punitive damage award is large, a serious question is raised as to whether the jury's decision was animated solely by "deterrence and retribution, the state policy concerns sought to be advanced [by such awards]," 111 S. Ct. at 1044, and that a punitive damages award of "more than four times the amount of the compensatory damages" was "close to the [constitutional] line." *Id.* at 1046.

Because the punitive award in *Haslip* did not cross that line, this Court had no occasion to engage in any detailed reasonableness inquiry in that case. This case presents the opposite end of the due process spectrum. The $10 million penalty assesssed against TXO is so clearly excessive and strays so far from the traditional notions of fairness established by "history and wide practice," see *Schad* v. *Arizona*, 111 S. Ct. 2491, 2500 (1991), that it clearly violates "fundamental fairness . . . [and] the rationality that is an essential component of that fairness." *Id.* at 2501. Moreover, even if the violation were not as clear as it is here, nothing in the record below or any plausible policy concern of the State can support the penalty imposed by this jury. Accordingly, West Virginia plainly has deprived TXO of property without due process of law.

A. The $10 Million Punitive Award Assessed Against TXO Far Exceeds All Objective Standards Of Fairness Established By History And Wide Practice.

West Virginia found TXO's conduct violative of a tort standard embodied in no prior West Virginia decision, and included in the laws of other jurisdictions only in very different form. See *infra* pp. 47-48. That conduct threatened no harm to any person or property and caused only a modest financial injury—the loss of $19,000 in attorney's fees. Nonetheless, TXO was assessed with a multi-million dollar punitive award that was *526 times* as great as the injury it had inflicted, and more than *20 times* higher than any punitive award ever before upheld in West Virginia for *any* tort. On these facts, there is simply no plausible argument that the challenged award meets even the most minimal standards of fundamental fairness. Instead, the $10 million award "jar[s] one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1043.

Of course, such relative determinations need not (and, indeed, cannot) be made strictly in a vacuum. This Court has long noted the "importance of history and widely shared practice as concrete indicators of what fundamen-

tal fairness and rationality require." *Schad*, 111 S. Ct. at 2500. Thus, the fundamental fairness determination is properly informed by such objective indicia of fairness as (1) awards upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards. Each of these provides an objective indicator of the magnitude of the penalty necessary to further legitimate state goals. Tested against these objective standards, the challenged award is clearly excessive.[10]

When measured against the punitive awards upheld against other West Virginia defendants, the challenged award clearly is "grossly out of proportion to the seriousness of the offense." See *Haslip*, 111 S. Ct. at 1045. The misconduct alleged here involved neither violence nor threat of violence to any person or property.[11] No dangerous or potentially dangerous instrumentality was involved. No person's honor, dignity, or reputation was harmed or even threatened. It was nothing more than a commercial dispute.[12] Slander of title threatens only financial harm,

[10] Although in this case the challenged award far exceeds the standards of fairness established by *all four* objective indicia, a particularized due process scrutiny should be triggered whenever even one or two of these indicia suggest that a punitive award reflects jury bias rather than a means to effect legitimate state goals.

[11] It is beyond doubt that where punishment is concerned, society is far more protective of people than property. *See, e.g., Solem* v. *Helm*, 463 U.S. 277, 293 (1983); *Eisert* v. *Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226, 229 (Minn. 1982) (decision to deny punitive awards where injury is limited to property damage "reflects the higher value our society places on the safety of persons than it does on the security of property"); *Slough* v. *J.I. Case Co.*, 650 P.2d 729 (Kan. Ct. App. 1982) (reducing punitive award because "there was a minimum of evidence to indicat[e] a danger of physical injury to persons as a result of [appellant's] conduct").

[12] *See Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687, 710 (Md. Ct. Spec .App. 1991) (Jury awarded

and even that harm is limited by the finite value of the relevant property interest. In this case, the jury found that because TXO's misconduct in no way decreased the value of respondents' property interest, there was no direct financial injury. Notwithstanding these facts, the jury imposed on TXO a punishment *20 times larger than any ever before upheld in West Virginia for any misconduct.*[13] Whatever may be said of the exact placement of the offense of slander of title on the scale of relative seriousness, there clearly is no rational basis to conclude that it is an evil so great that it deserves the State's most serious monetary sanction (or, indeed, even that it deserves an above-average sanction).[14] A sanction 20 times greater than the previous record award is surely excessive under these circumstances.

The exceptional nature of this award is even starker when viewed in light of punitive awards for slander of title in other jurisdictions. Although the tort of slander

$250,000 in compensatory damages and $40 million in punitive damages; trial court remitted punitive damages to $12.5 million. Court of appeals vacated and remanded for a new trial, observing "[t]his was, at bottom, a commercial dispute between two business competitors"), *cert. denied*, 605 A.2d 137 (Md. 1992).

[13] Appendix A lists West Virginia punitive awards upheld on appeal, as well as those reversed on appeal.

[14] Comparison to awards upheld against other defendants in the same jurisdiction constitutes an especially important indicator of rationality given the real danger of discrimination against nonresident defendants. West Virginia itself has recognized that unchecked jury discretion "[i]nevitably . . . leads to increasing efforts to redistribute wealth from without the state to within." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W.Va. 1991). *See also id.* at 905 ("this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill"). The *Garnes* discussion was not idle speculation—the four highest punitive awards ever affirmed in West Virginia, including the decision below, were assessed against out-of-state defendants. *See Jarvis* v. *Modern Woodmen of Am.*, 406 S.E.2d 736 (W.Va. 1991); *Berry* v. *Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367 (W.Va. 1989); *Bell* v. *Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W.Va. 1985). Such unprincipled redistribution of wealth by a jury is inherently arbitrary.

of title is longstanding in other states, no court in any jurisdiction has *ever* affirmed a multi-million-dollar punishment for slander of title,[15] and in only five cases has the punitive award ever exceeded $100,000.[16] Indeed, TXO's research has uncovered fewer than 40 cases in this nation's history in which *any* punitive award was deemed appropriate for slander of title. The median punitive award in those cases (in 1991 dollars) was approximately $26,000, less than one-third of one percent of the penalty imposed here.

The challenged award also widely diverges from historical practice. In this regard, the excessiveness of the award against TXO is demonstrated by its enormous divergence from the tempered and consistent judgment of history. Civilized societies have long limited to moderate amounts punitive awards for harms to property or financial interests that are not particularly amenable to concealment. See, *e.g.*, Exodus 22:9 ("For all manner of trespass [to goods], . . . whom the judges shall condemn, he shall pay double unto his neighbor"); Exodus 22:1 ("If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep"); Statute of Gloucester, 6 Edw. I, ch. 5 (1278) (treble damages for waste), *cited in Browning-Ferris*, 492 U.S. at 274; W. Buckland, *A Textbook of Roman Law* 577-79 (1921) (noting that under the Law of the Twelve Tables, some victims of theft were allowed to recover twice the value of the stolen property).

Moreover, TXO's punishment far exceeds any legislatively determined punishment for such conduct. Legislative judgments are particularly valuable guides to proportionality, because the legislature is responsible for establishing the entire scheme of civil and criminal sanctions. Indeed, as the West Virginia Supreme Court held in a similar case involving property damage:

> Upon this question of the measurement of punitive damages we have some statutes allowing a recovery of double damages or treble damages where a trespass is committed wantonly and maliciously, and while we do not mean to say that these statutes furnish an infallible guide to be followed in the ascertainment of punitive damages in a case like this, still they are an indication of public policy as ascertained and declared by the legislative body in this regard . . . .

Pendleton v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (W.Va. 1918). Although West Virginia has no damage cap directed specifically at slander of title (no such cause of action was recognized in West Virginia until the decision below), the West Virginia legislature has determined that trebling compensatory damages fully serves West Virginia's punishment goals in similar contexts in which the misconduct threatens only financial or property damage.[17] Other state and federal legislatures have made similar determinations.[18] And where legislatures have imposed fines for slander of title and similar conduct, those fines have always been measured in thousands, not millions, of dollars.[19]

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[15] Appendix B lists published slander of title decisions that included punitive awards.

[16] *See* Appendix B. In *Summa Corp.* v. *Greenspun*, 655 P.2d 513 (Nev. 1982), a $1 million punitive award was affirmed in a slander of title case. Although it is only a tenth as large as the punishment imposed here, that punitive award is, in light of the overwhelming evidence of history and wide practice, also constitutionally suspect. It bears noting that Summa Corp.'s agent, and the individual responsible for the slander of title, was Howard Hughes, a well known and controversial figure.

[17] *See, e.g.*, W.Va. Code §§ 37-7-4 (treble damages for waste), 37-7-5 (same), 61-3-48a (1992) (treble damages for carrying any trees from another's land).

[18] Appendix C lists selected state statutes placing limitations on punitive damages awards in cases involving similar or analogous conduct, as well as in cases involving personal injury, fraud, and civil remedies for crimes. *See also* 15 U.S.C. § 15 (1985) (treble damages for violation of antitrust law); 40 U.S.C. § 489(b)(1) (1992) (double damages for fraud on the United States government).

[19] Most state slander of title statutes specify only actual damages and costs, not punitive damages. *See, e.g.*, Cal. Civ. Code § 880.360 (West 1992); Conn. Gen. Stat. Ann. § 47-33j (West 1990); Ind. Code Ann. § 32-1-5-9 (Burns 1992); Kan. Stat. Ann. § 58-3410

Nor does the challenged award bear any "understandable relationship to compensatory damages." See *Haslip*, 111 S. Ct. at 1045. As West Virginia's highest court has recognized, "[a]s a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E. 2d 897, 909 (W.Va. 1991).[20] Before this case, the West Virginia courts had *never*, in any case, upheld

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(1983); Mich. Comp. Laws Ann. § 565.108 (West 1991); Neb. Rev. Stat. § 76-296 (1991); N.D. Cent. Code § 47-19.1-09 (1991); Okla. Stat. Ann. tit. 16, § 79 (West 1991); Wyo. Stat. § 34-10-109 (1992).

Those States that have seen fit to provide for punitive damages have designated amounts far smaller than those assessed in the present case. *See, e.g.*, Ariz. Rev. Stat. Ann. 33-420(A) (1992) (title slanderer liable to title holder "for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording or filing, whichever is greater, and reasonable attorney fees and costs"); Cal. Penal Code § 115.5(a) (Deerings 1993) (person who files false document which affects title to a residence containing not more than four dwelling units "is punishable, in addition to any other punishment, by a fine not exceeding seventy-five thousand dollars"); Colo. Rev. Stat. § 38-35-109(3) (1992) (civil liability for unreasonably filing false lien is $1000 or actual damages, whichever is greater, plus attorney fees); Wis. Stat. Ann. § 706.13 (West 1989-90) (person who slanders title "is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1000 plus any actual damages caused thereby").

[20] The idea that punitive awards should be determined by reference to the compensatory award was well established even before the Fourteenth Amendment was adopted. *See, e.g., Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852) ("the exemplary damages allowed should bear some proportion to the real damage sustained"). *See also Hunter* v. *Kansas City Rys.*, 248 S.W. 998, 1002 (Mo. App. 1923) ("Exemplary damages should bear some reasonable proportion to the actual damages sustained"); *Mobile & Montgomery R.R.* v. *Ashcraft*, 48 Ala. 15, 33 (1872) (same); *Willis & Bro.* v. *McNeill*, 57 Tex. 465, 480 (1882) (same). Although many courts phrase this relationship requirement in terms of the ratio between punitive damages and the *harm* caused, the modern measure of compensatory damages, informed as it is by concepts of actual injury and proximate causation, provides a fair proxy, in most cases, of that harm.

a punitive award greater than 10 times the associated compensatory damages for any cause of action. Moreover, in all but three of the cases from other jurisdictions in which a punitive award was found appropriate in a slander of title action, the approved ratio of punitive to compensatory damages was *less than four to one*, and the highest such ratio was nine to one. See Appendix A. Here, by contrast, the punitive damages award was more than *500* times the compensatory award.

In *Haslip*, this Court observed that a punitive award of four times compensatory damages was "close to the [constitutional] line." 111 S. Ct. at 1046. Fundamental fairness review, like most constitutional exercises, may not admit of bright-line distinctions. Here, however, *all* of the relevant objective indicia demonstrate that the $10 million award against TXO strays far beyond any traditional notions of fairness established by history and wide practice. Where the challenged award exceeds the bounds of contemporary and historical practice by *orders of magnitude*, absent compelling and particularized justification, the award is clearly arbitrary and excessive, and therefore unconstitutional.

B. The $10 Million Punitive Award Assessed Against TXO Far Exceeds Any Amount Plausibly Necessary To Further West Virginia's Legitimate Goals.

This is not to say, of course, that all $10 million punitive awards are *per se* unconstitutional. Perhaps there is some misconduct for which a State could justify such an extraordinary penalty as necessary to meet its legitimate goals. If such a case exists, this is not that case.

The only real justification offered by the court below for the staggering penalty assessed against TXO was that its corporate shareholder has a large "pocketbook." Soaking large out-of-state corporations is, however, *not* a legitimate state goal. Moreover, because any relationship between corporate wealth and legitimate punishment goals is tenuous at best, this Court recognized in *Haslip* that

large punitive awards cannot be justified on a "deep pocket" theory. See *Haslip*, 111 S. Ct. at 1045.

Nor can the size of the challenged award be explained rationally as necessary to further West Virginia's traditional goals in assessing punitive damages, retribution and deterrence. Viewed in light of the limiting principles embodied in West Virginia's chosen theories of punishment and all of the relevant objective indicia of rationality, it is clear that the $10 million award assessed against TXO greatly exceeds any objectively based deterrent as well as any amount that might fairly serve to punish TXO. It is punishment without purpose, and therefore a constitutionally excessive deprivation of property without due process of law.

1. *The "Deep Pocket" Theory Adopted By The Court Below Cannot Justify The $10 Million Penalty Assessed Against TXO.*

The court below offered three possible justifications for the extraordinary penalty assessed against TXO—that the conduct was reprehensible, that the potential harm was great, and that the defendant was wealthy. With respect to reprehensibility, however, the West Virginia court offered only its observation that "the jury's verdict says more than we can say in an opinion twice this length." Pet. App. 40a. But this argument is circular: the size of the verdict justifies the size of the verdict. In any event, comparisons to other awards completely undermines the argument that TXO's conduct was "reprehensible" to the tune of $10 million.

Similarly, with respect to potential harm, the court noted only that the "type" of conduct undertaken by TXO "could potentially cause millions of dollars in damages" if repeated in other cases. *Id.* Of course, *every* type of tortious conduct could cause "millions of dollars in damages" under the right (or wrong) circumstances. If stating as much is enough to justify a multi-million dollar punitive award in every case where there was *not* millions of dollars in damage, or even a realistic possibility of

such injury, then the Constitution's guarantee of fundamental fairness is without content in the punitive damages context.

That leaves only wealth. See *id.* at 42a ("it is the pocketbook of USX that the jury verdict must reach"). Although evidence of wealth may *explain* the extraordinary verdict in this case,[21] it surely cannot *justify* it. The relevance of preexisting wealth to the goals of deterrence and (at least where corporations are concerned) retribution is doubtful at best. See *infra* note 25. Moreover, it is beyond doubt that telling the jury that wealth is an appropriate measure of punishment—especially where, as here, that is the *only* concrete measure offered—invites the jury to act on bias, passion, and prejudice, rather than the State's legitimate social goals. See *infra* pp. 35-38. Thus, as this Court warned in *Haslip*, a penalty may not, consistent with due process, be justified solely on the basis of a defendant's wealth. *Haslip*, 111 S. Ct. at 1045 (plaintiffs may not "enjoy a windfall because they had the good fortune to have a defendant with a deep pocket"). Such purely arbitrary redistribution of wealth from defendant to plaintiff serves no legitimate state interest,[22] and can only be characterized as fundamentally unfair.

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[21] Indeed, the Court need look no further than the closing argument, the jury verdict, and the decision below to conclude that petitioner was punished—and punished hard—not because the punishment was deserved or necessary to deter similar misconduct, but because petitioner was part of a large out-of-state corporation. The only *measure* of punitive damages provided to the jury was wealth (of petitioner *and* its corporate affiliates). *See infra* pp. 35-38. Similarly, the only measure of punitive damages applied by the reviewing court was wealth (this time of petitioner, its corporate affiliates, *and* its stockholder). Pet. App. 42a.

[22] *See, e.g., Gertz* v. *Welch, Inc.*, 418 U.S. 323, 349 (1974) ("States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury").

2. *The Punitive Award Assessed Against TXO Greatly Exceeds Any Amount That Might Fairly Serve As Retribution For TXO's Misconduct.*

Retributive theory, which has its foundations in conceptions of fairness—the principle of "just desert"— relies on the premise that some tortfeasors are morally "deserving" of extra-compensatory sanction. See I. Kant, *The Metaphysical Elements of Justice* 99-107 (Bobbs-Merrill ed. 1965). Accordingly, as this Court and the courts of West Virginia have long recognized, a punitive measure serves a State's retributive goals only if punishment is deserved.[23]

Of course, determining that a tortfeasor deserves *some* extra-compensatory punishment does not answer the question *how much* punishment is deserved. However, "to punish the guilty beyond their guilt is not different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice." Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989). See also *Massachusetts Bonding Ins. Co.* v. *United States*, 352 U.S. 128, 133 (1956) ("By definition, puni-

[23] *See, e.g., Felton* v. *United States*, 96 U.S. 699, 703 (1877) ("All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one"); *Lake Shore & Mich. S. Ry.* v. *Prentice*, 147 U.S. 101, 115 (1893) ("No man should be punished for that of which he is not guilty"); *State ex rel. C.A.H.* v. *Strickler*, 251 S.E.2d 222, 225 (W.Va. 1979) ("The State may not punish a person not deserving of punishment").

Thus, to the extent that any of the punishment challenged here was directed at TXO's corporate affiliates—and the reviewing court's discussion of pre-existing wealth makes clear that some portion of the award was directed at those affiliates, *see* Pet. App. 41a-42a—that portion of the award cannot be justified on retributive grounds. Only employees and agents of TXO were involved in the misconduct alleged here. Neither USX Corporation nor any of its subsidiaries was in any way involved. Only later did USX become the owner of TXO. Having committed no wrong, neither USX nor its non-TXO corporate affiliates are deserving of punishment. *See generally* Brief of Washington Legal Foundation as *amicus curiae*.

tive damages are based upon the degree of the defendant's culpability"). This principle of "proportionality" between punishment and offense, and its constraining role on retributive penalties, has been recognized by all civilized societies.[24]

And "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U.S. 277, 284-85 (1983). In 1215, three chapters of Magna Carta were devoted to the rule that "amercements"—"all-purpose" monetary sanctions used to penalize both criminal and civil wrongdoing, *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 269 (1989)—must be proportional to the offense. See, *e.g.*, A. Pallister, *Magna Carta: The Heritage of Liberty* 113 (1971) (Magna Carta provides, at ch. XIV, that "[a] Freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof"). The proportionality principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275), *cited in Solem*, 463 U.S. at 284-85, and courts relied on these proportionality guarantees to invalidate disproportionate punishments. See, *e.g., Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3, 5 (1934) (amercement vacated and bailiff who imposed amercement ordered to "take a moderate amercement proper to the magnitude and manner of that offence"), *cited in Browning-Ferris*, 492 U.S. at 289 (O'Connor, J., concurring in part and dissenting in part).

[24] *See, e.g.*, Aristotle, *Nicomachean Ethics*, in 9 *Great Books of the Western World* 379-81 (W. Ross ed. 1952) (justice consists of rendering equal the offense and the consequences of the action); Exodus 21:24 ("Eye for eye, tooth for tooth . . ."); Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 844 (1969) (noting a similar equality between offense and penalty in the laws of the Angles and Saxons of pre-Norman England as well as the Germanic peoples of the Middle Ages and the Norse Vikings).

Accordingly, this Court has explicitly recognized for more than a century that, as a matter of due process, the "just desert" rationale of retributive justice inherently limits a retributive penalty to an amount proportional to the wrong inflicted. See, *e.g.*, *Weems* v. *United States*, 217 U.S. 349, 349 (1910) ("it [is] . . . a precept of justice that punishment . . . should be graduated and proportional to offense"). See also *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 77 (1971) (Harlan, J., dissenting) ("most of our jurisprudence proceeds upon the premise that legislative purposes can be achieved by fitting the punishment to the crime"). Indeed, this Court's earliest decisions dealing with extra-compensatory damage awards recognized the proportionality requirement inherent in any award of "vindictive" damages. See, *e.g.*, *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) ("a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, *having in view the enormity of his offence*") (emphasis added). Thus, a punitive award cannot, consistent with any rational application of the retributive theory of punishment, be "wholly disproportioned to the offense." *St. Louis Iron Mountain & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919).

It is difficult to conceive of a State adopting a retributive theory of punishment unlimited by any proportionality principle. Apart from what this case may suggest, it is clear that West Virginia has not done so. Indeed, the proportionality principle is expressly stated in the West Virginia constitution. See W.Va. Const., Art. III, § 5 ("Penalties shall be proportioned to the character and degree of the offense"). See also *Wanstreet* v. *Bordenkircher*, 276 S.E.2d 205, 214 (W.Va. 1981) (allowing an excessive sentence "would ignore the *rationality* of our criminal justice system where penalties are set according to the severity of the offense") (emphasis added). Thus, disproportionate punitive awards do not serve West Virginia's retributive goal of punishment.

The award challenged here is 20 times higher than any punitive damages award ever upheld in West Virginia in

any type of case. See Appendix A. Moreover, no other jurisdiction has ever declared slander of title deserving of punishment of this magnitude. See Appendix B. And legislators who have considered the issue uniformly have placed slander of title and, more generally, torts which threaten only financial harm, at the lower end of the retributive scale. See Appendix C. Simple logic and all relevant objective indicators demonstrate that the $10 million award against TXO reflects bias and prejudice rather than any considered retributive judgment, and therefore must be set aside. See *Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring in judgment) ("the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case").[25]

3. *The Punitive Award Assessed Against TXO Greatly Exceeds Any Amount That Might Rationally Be Justified To Deter Similar Conduct.*

Deterrence theory permits the assessment of extra-compensatory damages against a tortfeasor for the purpose of discouraging similar conduct. The premise of deterrence theory is that a person will not act irrationally by doing something that is expected to lose money. Adding to the penalty associated with an activity decreases the

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[25] The pre-existing wealth of TXO and its corporate affiliates plays no relevant role in the retributive calculus. As Judge Easterbrook recently noted:

> Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. *L'Oreal, S.A.*, No. 91-2842, 1992 WL 314270 (7th Cir. Nov. 6, 1992). *Cf. City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (noting general refusal to allow punitive damages against municipal corporations because "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers").

expected profitability of that activity, and the incentives to engage in misconduct are thus reduced. Accordingly, a rational application of deterrence theory produces a punitive award just sufficient to persuade individuals not to engage in the activity that the State condemns.[26]

In examining the reasonableness of the fit between the $10 million award in this case and the goal of deterrence, the starting point should be the theory of deterrence adopted by the State, as applied to this tort. As applied here, West Virginia rightly seeks to deter the filing of false claims to property to obtain economic advantage in dealings with the owner of that property. In this context, the title slanderer's gain is no greater than the harm he can impose on the true owner by lowering the property's value. Accordingly, assessing a damage award that fully recovers the actual harm to the party whose title has been slandered would have the effect of removing *all* gains from the wrongful activity, thereby effectively deterring that activity.[27]

If every tort were detected and penalized, no punitive award would be necessary to further the State's deter-

[26] West Virginia recognizes that there are substantial social costs associated with overdeterrence. *See, e.g., Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 903 (W.Va. 1991). *See also Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) ("severe . . . penalties will chill wholly legitimate business agreements"). Indeed, the decision below expressly recognized the problem of overdeterrence. See Pet. App. 15a ("Although we want to discourage people from slandering the title of others, we do not want to discourage people from making legitimate (though possibly weak) claims of their own"). The award in this case hardly balances those goals.

[27] It is important to recognize that this narrow analytic form of means-end testing does *not* rest on any requirement that States adopt any particular economic theory; rather due process means-ends testing requires only that a State, having itself adopted a theory grounded in certain basic economic principles, rationally apply that theory and those principles. *Compare Nordlinger* v. *Hahn*, 112 S. Ct. 2326 (1992) *with Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989).

rence goal. See, *e.g.*, Dobbs, *supra*, 40 Ala. L. Rev. 831, 893 ("Appropriate deterrence will be achieved, in general, if all victims sue and fully recover").[28] But some tortfeasors may escape detection and punishment, and therefore the penalty may, when inflicted, be greater than the harm caused by the activity. If, for example, only one in three tortfeasors is likely to be caught and punished, the punitive award is properly set at twice compensatory damages, for a total award (compensatory plus punitive) of three times compensatory damages. See, *e.g.*, *Zazu Designs* v. *L'Oreal, S.A.*, No. 91-2842, 1992 WL 314270 (7th Cir. Nov. 6, 1992) ("Punitive damages are appropriate when some wrongful conduct evades detection; a multiplier then both compensates and deters").

Thus, the more easily a defendant may conceal his conduct, the larger the multiple of compensatory damages (or, in other contexts, expected gains) necessary to provide the appropriate deterrent incentive. Simple logic dictates that the enormous multiplier (526 times compensatory damages) used in this case bears *no* rational relation to the relevant likelihood of concealment. The conduct alleged here is *publication*, to the world at large, to the State (through the recording of a deed and the institution of legal proceedings), *and* directly to the putative victim, of a false claim to property. Obviously, the risk of concealment in this context is virtually nonexistent. And, although one can imagine cases in which victims do not

[28] West Virginia has long recognized this concept. *See, e.g., Mayer* v. *Frobe*, 40 W.Va. 246, 260 (1895) ("if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong"). *See also Memphis Community School Dist.* v. *Stachur*, 477 U.S. 299, 307 (1986) ("Deterrence is also an important purpose of [the § 1983] system, but it operates through the mechanism of damages that are compensatory"). *See also Haslip*, 111 S. Ct. at 1045 (approving Alabama's post-verdict standards that ensure punitive damages awards "have some understandable relationship to compensatory damages").

detect slander of their title, slander of title is not the sort of conduct, like insurance or consumer fraud, for example,[29] where active concealment plays a large role. If the title slanderer hopes to profit from his misconduct, the false claim must be disclosed to the public or the putative victim.[30]

Accordingly, on a relative scale, a rational deterrence-based punitive damage multiplier in a slander of title case would fall somewhere in the middle of the range of appropriate multipliers—less than the multiplier for a tort, like consumer fraud, to which active concealment is crucial, but more than the multiplier for a tort like battery, in which detection is instantaneous and prosecution almost certain. The probability of apprehension and conviction approaches unity in typical tort cases.[31] Thus,

[29] An extreme example is *Boise Dodge* v. *Clark*, 453 P.2d 551 (Idaho 1969), in which the defendant car dealership rolled back odometers on the demonstrator cars it sold, representing them as new. The court justified a punitive damage award of approximately 35 times the compensatory award based upon its estimate that few purchasers would discover the illegal conduct.

[30] One factor that plainly is *not* relevant in setting a deterrence-based award is the defendant's pre-existing wealth. For the rational actor posited by the deterrence theory, the decision whether to pursue a particular activity turns on the expected costs and benefits *from that activity* alone. *See, e.g.*, Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989) ("a rational, risk-neutral, profit-motivated corporation, regardless of its size, will refrain from any act that has associated expected costs exceeding the associated expected gains for the corporation"); 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Use* 254-55 (1991) ("what is relevant [to deterrence] is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question"). *See also* Brief of the American Tort Reform Association, *et al.*, as *amici curiae*.

[31] *See, e.g.*, Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 31 (1975). *See also* Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1178 (1989) ("enforcement error is more likely to be of the magnitude of 2/1 or smaller, possibly rising to as high as 10/1 in cases of fraud").

not surprisingly, empirical studies demonstrate that juries and judges faced with the task of assessing an appropriate deterrent award generally impose multipliers of less than four in tort cases.[32] The $10 million award here, by contrast, embodies a multiplier of *526*, more than 100 times the multiplier appropriate in the average tort case, despite the fact that *nothing* about this case indicates that TXO's conduct was easily concealed. There is, of course, no "mathematical bright line betwen constitutionally acceptable and . . . unacceptable," *Haslip*, 111 S. Ct. at 1043, but whatever the appropriate scope of review, it is patent that the punitive award against TXO far exceeds any amount plausibly necessary to achieve West Virginia's deterrence goal of punishment.[33]

In sum, the extraordinary penalty assessed against TXO in this case cannot plausibly be justified as necessary to further any legitimate state goal. This Court has long insisted that the interests protected by the Due Process Clause "not be interfered with . . . by [state] action which is arbitrary or *without reasonable relation to some purpose* within the competency of the State to effect." *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923) (emphasis added). See also *Haslip*, 111 S. Ct. at 1045 (approving Alabama scheme designed to ensure that a punitive award "does not exceed an amount that will accomplish

[32] *See, e.g.*, Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 60 (1990) (citing empirical evidence that the median ratio of punitive damages to other damages ranges from one to four).

[33] A survey of West Virginia's own punitive damages decisions demonstrates that even in cases of insurance fraud and other easily concealed torts a multiplier of less than ten has been thought sufficient to serve the State's deterrence goals. *See, e.g.*, *Painter* v. *Raines Lincoln Mercury, Inc.*, 323 S.E.2d 596 (W. Va. 1984) (multiplier of 7.6 for fraud). *See also* Appendix A (multipliers ranging from less than one to 10.6). Indeed, only one West Virginia case ever upheld a multiplier of 10. *Id.* It is thus inconceivable that the decision here to uphold the punitive award with a multiplier of 526 is the result of a rational application of West Virginia's chosen deterrent theory.

society's goals of punishment and deterrence"); *id.* (punitive awards should be "rational in light of their purpose to punish what has occurred and to deter its repetition").[34]

Meaningful means-ends review of out-of-the-ordinary punitive awards preserves to the States broad discretion in implementing their goals. The rationality component of the Due Process Clause requires only that States ground such punitive awards in *some* legitimate theory, and that those awards not exceed the outer limits imposed by reasonable application of the chosen theory. Clearly, punishment that goes far beyond the traditional notions of fairness established by history and wide practice *and* far beyond that called for by the State's own announced justifications lacks any legitimacy whatsoever. Thus, there exists a strong constitutional foundation for narrow analytical testing of consistency between means and ends when a State imposes a penalty that is out of the ordinary, and under that standard of reasonableness, the award in this case clearly fails.

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[34] *See also Moore* v. *City of East Cleveland*, 431 U.S. 494, 520 n.16 (1977) (due process is violated where government employs "a means not reasonably related to the ends it seeks to achieve"); *id.* at 498 n.6 (this Court's cases have *never* departed from "the [basic] requirement that the government's chosen means must rationally further some legitimate state purpose").

Meaningful means-ends review is, of course, a common mode of constitutional analysis. Bail, for example, is constitutionally excessive if it is "set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose of bail," namely, ensuring the presence of the defendant. *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951). Similarly, criminal conduct can be penalized with death only if that punishment reasonably serves a State's asserted purposes of retribution and deterrence. *See, e.g., Enmund* v. *Florida*, 458 U.S. 782, 800-801 (1982). And means-ends rationality has long been the accepted mode of applying the Equal Protection guarantee of the Fourteenth Amendment. *See, e.g., City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation").

To be sure, not all large punitive damage awards are constitutionally defective. But it is settled that punitive awards must bear some reasonable relationship to the purposes articulated by States in assessing such punishment or fail to satisfy the minimum requirements of fundamental fairness mandated by the Due Process Clause. Modest and measured punitive awards were familiar to the Framers of the Constitution and the Fourteenth Amendment,[35] and they survived without constitutional challenge for the better part of two centuries. The award here, by contrast "passes the bounds of reason and assumes the character of merely arbitrary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 204 (1912).

II. WEST VIRGINIA'S PROCEDURE FOR AWARDING PUNITIVE DAMAGES IN THIS CASE FAILED TO SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

The Due Process Clause requires that fundamentally fair procedures be provided before a State may take property or, as here, transfer property from one person to another. See *North Ga. Finishing, Inc.* v. *Di-Chem Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974). Critical to this concept in the context of punitive damages is the requirement that jury discretion be channelled in furtherance of legitimate State purposes, and restrained from improper expression of bias, prejudice, or emotion. Thus, *Haslip* leaves no doubt that due process requires States to provide procedural protections that establish a "significantly definite and meaningful constraint on the discretion of . . . fact finders in awarding punitive damages." 111 S. Ct. at 1045. In *Haslip*, where the ratio of punitive damages to compensatory damages was four to one, the Court concluded that the jury's "significant discretion" was appropriately constrained by jury instructions and the two levels of

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[35] *See, e.g.*, Brief of the United States Chamber of Commerce, *et al.*, as *amici curiae*, and Brief of the American Tort Reform Association, *et al.*, as *amici curiae*.

meaningful judicial review undertaken by the state courts in that case. *Id.* at 1044-45.

The procedure afforded to TXO in this case fell far short of the *Haslip* standard. Whereas in *Haslip*, the jury instructions provided helpful guidance to the jury, *id.* at 1044, in this case, the jury instructions served affirmatively to *mis*guide the jury by encouraging it to place emphasis on a largely irrelevant and highly prejudicial factor, the wealth of TXO and its corporate affiliates. Nor was there any countervailing curb on the arbitrariness of the jury's award in the form of careful judicial review. No preestablished meaningful and tested criteria existed to guide the trial or appellate court in examining the punitive award entered by the jury in this case. To the contrary, the trial court summarily rejected TXO's post-trial challenges to the punitive damages award, and the West Virginia Supreme Court affirmed, justifying the result based on its subjective and standardless assessment that TXO had been "really mean."

The West Virginia courts' failure to comply with the standards enunciated in *Haslip* is not the only flaw in the punitive award at issue here. Due to the dearth of guidance provided by the West Virginia punitive damages scheme, TXO simply had no notice that it could be ordered to pay $10 million for the newly recognized offense of slander of title as applied in this case. As such, the scheme is unconstitutionally vague.

A. The Procedure In This Case Was Fundamentally Unfair Under *Haslip* Because No Aspect Of The State Court Procedures Supplied The Requisite Check On Jury Discretion.

1. *The Jury Instructions Virtually Guaranteed That The Jury's Discretion Would Be Abused.*

In *Haslip*, this Court first reviewed the jury instructions in light of "general concerns of reasonableness and adequate guidance from the court." 111 S. Ct. at 1043.

The Court found that the instructions conveyed to the jury "the state policy concerns sought to be advanced." *Id.* at 1044. Significantly, the Court emphasized the fact that "[a]ny evidence of [the defendant's] wealth was excluded from the trial." *Id.* at 1043. Thus, although the jury had "significant discretion," *id.* at 1044, that discretion was "exercised within reasonable constraints," *id.*, and was not influenced by inappropriate information.

In this case, in contrast, not only was the jury left with "significant discretion," *id.*, but that discretion was tainted in a manner that the *Haslip* jury's discretion was not. The jury here was provided with more information than was the jury in *Haslip*. But far from serving to narrow and guide the jury's discretion, that "extra" information was highly prejudicial and inappropriate and it heightened the arbitrariness of the jury's punitive award. Most notably, the jury was specifically instructed to consider evidence of the wealth of TXO in deciding how much of a punitive award to enter. J.A. 34-35. Additionally, the jury was told that some undefined supplemental "compensation" was a goal of punitive damages. J.A. 34. Both of these elements could only tend to produce an oversized punitive award.

a. *Instructing The Jury That It Should Base The Amount Of Punitive Damages On The Wealth Of TXO And Its Corporate Affiliates Was Unconstitutional.*

"Due process may not require a detailed roadmap, but it certainly requires directions of some sort." *Haslip*, 111 S. Ct. at 1059 (O'Connor, J., dissenting). It should be common ground that the jury ought not be given a roadmap to the wrong destination, which is the "defendant['s] . . . deep pocket." *Id.* at 1045. Yet this is exactly where the TXO jury was directed. The jury here was specifically told that it should consider "the wealth of the perpetrator" because "to deter such conduct may require a larger fine upon one of large means than it would upon

one of ordinary means." See J.A. 34-35.[36] In *two* separate closing arguments for respondents, the jury was repeatedly told the net assets of TXO and its corporate affiliates, and was encouraged to derive a punitive damages figure based solely on those numbers. See Appendix D & Appendix E. Because the size of the punitive damages award was directly related to the *only* concrete guidance given to the jury, the inference is inescapable that the wealth portion of the instructions significantly affected the jury's verdict and thereby rendered the award unconstitutional.

Evidence of a defendant's financial condition is inherently prejudicial because it invites unjustified awards, a point courts and legislatures have recognized in many contexts. Thus, in holding that a municipality is immune from punitive damages under 42 U.S.C. § 1983, this Court noted that "evidence of a tortfeasor's wealth . . . may have a prejudicial impact on the jury [due to the unlimited taxing power of a municipality], in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981). See also *In re Paris Air Crash*, 622 F.2d 1315, 1323 (9th Cir.) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages [against a wealthy defendant] even when concrete elements of . . . intentional wrongdoing are absent"), *cert. denied*, 449 U.S. 976 (1980).

The potential for prejudice in the introduction of evidence of a defendant's wealth extends beyond unjustified

[36] The jury in this case was told that it should

> take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages.

J.A. 34-35. The jury was given no referent—and certainly no numerical guide—as to any of these factors other than "wealth." Nor was any explanation provided as to what these factors may entail.

punitive awards; it may also contribute to biased determinations of liability. Thus, evidence of the wealth of a punitive damages defendant is prohibited altogether in Alabama, as this Court emphasized in *Haslip*. 111 S. Ct. at 1044. See *Ridout's-Brown Serv., Inc.* v. *Holloway*, 397 So.2d 125, 127 (Ala. 1981) (Jones, J., concurring) (Alabama does not permit evidence of the wealth of the defendant in punitive damages cases because such evidence "impermissibly impugns the fact finding process regarding liability"). Other States follow this rule, as well,[37] or have taken similar steps in recognition of this problem.[38] "It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931).

This emphasis on the "wealth of TXO" was not only highly prejudicial, its relevance to any legitimate state goal is highly questionable.[39] See *supra* notes 25 & 30. Over TXO's objection, respondents were permitted to pre-

[37] Kentucky also follows this course. *See Hensley* v. *Paul Miller Ford*, 508 S.W.2d 759, 764 (Ky. Ct. App. 1974). In Colorado, evidence of the wealth of a punitive damages defendant is statutorily prohibited. Colo. Rev. Stat. § 13-21-102(6) (1992).

[38] Some States prohibit plaintiffs from presenting evidence of defendants' wealth until they have established a prima facie case that the prerequisites for a punitive damages award are present. *See, e.g.*, Or. Rev. Stat. § 30.925(2) (1991). *See also Farmy* v. *College Hous., Inc.*, 121 Cal. Rptr. 658, 670 (1975) (evidence of defendant's wealth may prejudice jury on compensatory damages issues). Other States prohibit discovery of the defendant's wealth until the jury has returned a special verdict on punitive damages. *See, e.g., Doralee Estates, Inc.* v. *Cities Serv. Oil Co.*, 569 F.2d 716, 723 n.9 (2d Cir. 1977) (applying New York law). In still others, it is reversible error to present evidence of defendant's financial condition where it is determined that there was not sufficient evidence for the awarding of punitive damages. *Feld* v. *Merriam*, 485 A.2d 742, 748 (Pa. 1984); *Berkeley Pump Co.* v. *Reed-Joseph Land Co.*, 653 S.W.2d 128, 138 (Ark. 1983).

[39] With respect to the goal of deterrence, for example, as noted above, deterrence theory directs consideration of the expected benefits of conduct, a calculation that turns on the potential profitability

sent to the jury evidence of the net assets of a 15-company division of USX, the corporation which acquired TXO after the acts in question had taken place.[40] Rec. 344-374. Such information did not serve either of West Virginia's stated goals for punitive damages. Rather, it eliminated any ability of the jury instructions reasonably to constrain the jury's discretion.

b. ***Permitting The Jury To Enhance Its Punitive Award Based On A Principle Of Unlimited And Standardless "Compensation" Served Merely To Add An Element Of Arbitrariness To The Award.***

The jury also was instructed that punitive damages may be awarded "to provide additional compensation for the conduct to which the injured parties have been subjected." J.A. 34. Because the jury had already been instructed on how to determine compensatory damages, see J.A. 23-24, 26, this instruction was nothing less than an open-ended invitation for the jury to act on its emotions and biases, and arbitrarily to redistribute wealth from an out-of-state corporation to resident litigants. The jury was given no objective method by which to calculate the amount of this "bonus" compensation, other than by ref-

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of the course of proscribed conduct, and is the same regardless of the "wealth" of defendant. The jury here received no information from which it could determine this potential profitability, and thus it was left wholly without guidance in calculating how much it would take to deter TXO (or USX, or any defendant, for that matter) from engaging in such conduct in the future. Similarly, with respect to the goal of retribution, the jury received no information—such as the amounts of other awards or of legislatively determined fines for similar conduct—that would aid them in calculating the amount appropriate to punish TXO.

[40] Thus, the jury was permitted to consider the assets of 14 companies that clearly were not responsible for the acts at issue. And the West Virginia Supreme Court, in affirming the award and the admission of this evidence, indicated that it would be appropriate to look *beyond* even the corporate affiliates of TXO to USX itself in determining the amount of the punitive award. Pet. App. 42a.

erence to the wealth of the defendant. Redistribution of wealth is not a stated goal of punitive damages in West Virginia, see *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W. Va. 1991) (criticizing juries' tendency to try to "redistribute wealth from without the state to within"), and if it were, it would surely be constitutionally suspect. *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 350 (1935). Yet the message given to the jury by this unexplained compensation instruction was that it should feel free to play the role of social architect to whatever extent it wished. It is difficult to imagine a jury instruction that offers a more hospitable invitation to arbitrariness, and the West Virginia jury obviously accepted that invitation.

2. ***TXO Did Not Receive The Benefit Of Meaningful Judicial Review At Either The Trial-Court Or Appellate Level.***

The Alabama procedure at issue in *Haslip* provided for two layers of judicial review of a punitive damages award to "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045. This Court in *Haslip* recognized that the Alabama procedure, which furnished courts with objective factors to inform their analysis, ensured that the mandated state-court review would conform to consistent and objective standards, and was not merely an expression of a judge's predilections and biases. In this case, the prejudicial nature of the jury instructions and the shockingly high ratio of punitive to compensatory damages surely called for exacting judicial scrutiny. Yet no meaningful review was conducted, and certainly not a careful, two-level review of the award under established criteria of the type approved by this Court in *Haslip*. To the contrary, the punitive award ultimately was affirmed by the West Virginia Supreme Court based solely on that court's contentless determination that TXO had been "really mean."

a. *The Trial Court's Review Was Unguided By Preestablished Criteria, And Its Summary Disposition Rendered The Court's Decision Unreviewable.*

In Alabama, both the trial court and the appellate court apply seven criteria to determine coherently "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Haslip*, 111 S. Ct. at 1405. As described by this Court, these criteria are:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. (citations omitted). When applying these criteria to punitive awards, trial courts in Alabama are required "to reflect in the record the reasons" for the action they choose to take or refrain from taking. 111 S. Ct. at 1044.

In this case, by contrast, no uniform standards had been promulgated by either the West Virginia courts or legislature to guide the trial court's review. Contrast *id.* ("Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards"). Unlike the trial court in *Haslip*, the trial court here was not required to make

findings on the record, and it made none. Rather, in stark contrast to the approach approved in *Haslip*, the trial court summarily denied TXO's post-trial motions from the bench. Pet. App. 74a. The absence of any meaningful post-verdict review on the record deprived TXO of this vital layer of due process protection.

b. *The West Virginia Supreme Court's Review Was Standardless And Subjective.*

Importantly, under Alabama's punitive damages scheme as approved in *Haslip*, the appellate review process begins with a comparative analysis. 111 S. Ct. at 1045. By taking into account other punitive awards made and legislatively determined fines for similar conduct, the reviewing court can establish a baseline for determining whether the award is "grossly out of proportion to the severity of the offense." *Id.* After its comparative analysis, the Alabama appellate court then performs a second review of established criteria for evaluating the punitive damages, and this analysis is conducted with the benefit of the trial court's recorded findings. *Id.*

In this case, the West Virginia Supreme Court conducted no comparative analysis. As previously demonstrated, such an analysis would have revealed that both the ratio of punitive to compensatory damages and the absolute dollar amount of the $10 million award against TXO represented extreme departures from the current and historical norms.[41] See Appendix A & Appendix B. Nor did the West Virginia Supreme Court apply "detailed substantive standards" to the award. 111 S. Ct.

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[41] TXO does not suggest that the amounts of previous awards under similar circumstances form absolute limits to any given punitive award, but rather, that a court should scrutinize out-of-the-ordinary punitive awards with particular care to ascertain whether they are reasonably limited to furthering the State's goals. *See* Wheeler, *supra* note 30, at 953 (suggesting that "there should be a rebuttable presumption that any punitive damages award more than twice the size of the compensatory award in a product liability case is excessive").

at 1045. Instead, it determined that the punitive award was not excessive based on its subjective determination that TXO had been "really mean." Pet. App. 40a.

The "really mean"/"really stupid" standard of review is, if anything, even less meaningful than the standards used in Vermont and Mississippi, which have evoked expressions of concern from this Court. See *Haslip*, 111 S. Ct. at 1045 n.10. West Virginia invites trial and appellate courts to give expression to their subjective views and personal predilections by assigning to a defendant's acts a label of either "really mean" or "really stupid"—emotion-laden words which are not "well-founded in our tort law . . . [and] upon which attorneys and judges have [not] traditionally relied." *TXO*, Pet. App. 54a (McHugh, C.J., concurring separately.) This is an endeavor certain to result in arbitrary decisions wholly at odds with due process. This essentially standardless review cannot be said to provide "an additional check on the jury's or trial court's discretion," 111 S. Ct. at 1045, neither of which was checked in this case, in any event.[42]

The application of the "really mean"/"really stupid" test also was too driven by and too dependent upon the jury's verdict to constitute the kind of "meaningful constraint on the discretion of . . . fact finders" emphasized by this Court in *Haslip*. *Id.* Under the "really mean"/"really stupid" test, the large size of the award itself formed the basis for the court's conclusion that TXO must have been "really mean." Pet. App. 40a

[42] Indeed, under West Virginia's new standard, any time the defendant is classified as "really mean," there is no limit on punitive damages. On the other hand, it is questionable whether punitive damages can *ever* be awarded in West Virginia if the tortfeasor is merely stupid. Under West Virginia law, punitive damages may only be awarded "[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear . . . ." Pet. App. 53a (citations and internal quotes omitted).

("As for the reprehensibility of TXO's conduct, . . . we believe the jury's verdict says more than we could say in an opinion twice this length"). This sort of bootstrap reasoning constitutes slavish deference to the jury's determination, not "meaningful review."

In sum, unlike the petitioner in *Haslip*, TXO did not receive three levels of careful scrutiny of the punitive damages award. To the contrary, TXO did not receive adequate scrutiny of the award imposed upon it at any level—jury, trial court, or appellate court. Thus, no matter what this Court in *Haslip* intended as the procedural bare minimum for satisfying the Fourteenth Amendment before punitive damages can be assessed against a tortfeasor, the procedures followed in West Virginia in this case were inadequate. Accordingly, the punitive award is unconstitutional and must be set aside.[43]

B. The Procedure Applied In This Case Was Unconstitutionally Vague.

The heart of the vagueness doctrine is concern for evenhandedness and regularity in the administration of

[43] The Court in *Haslip* balanced the interests of the petitioner and the interests of Alabama in determining that the procedure afforded in that State was constitutionally adequate. *See* 111 S. Ct. at 1044 ("These [jury] instructions, we believe, reasonably accommodated [the petitioner's] interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution"); *cf. Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (setting forth three-part balancing test for determining the degree of procedural protection required when the government acts to deprive an individual of a protected interest). Here, under such a balancing inquiry, the balance tips demonstrably in TXO's favor. The jury discretion in this case, unchecked by either careful guidance or meaningful judicial review, creates an enormous risk that a defendant deemed to be "really mean" by the size of the jury verdict will face a limitless monetary penalty, *see* Pet. App. 39a, when a much smaller penalty would still effectively serve the State's purposes. West Virginia, on the other hand, has no countervailing interest in avoiding such procedures; it has already unequivocally recognized that additional punitive damages procedures are warranted. *Garnes*, 413 S.E.2d at 908-910.

justice. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"). The vagueness doctrine also derives from a related principle that people must be given fair warning—"actual notice"—of the consequences of their actions." *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983). Thus, it has been settled for 180 years that a prosecution cannot go forward unless the legislature "first make[s] an act a crime [and] *affix[es] a punishment* to it." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 31, 34 (1812) (emphasis added).[45] Here, punitive damages were awarded against TXO in the absence of "explicit standards" at any level of the proceedings, and TXO had no notice whatsoever that it could be subjected to a $10 million award as a result of the type of conduct at issue here. Moreover, there is every reason for reviewing the vagueness of West Virginia's standards for imposing punitive damages in a searching light at least comparable to that used to examine penal standards.[46] Under any meaningful standard of clarity, however, the system here must be found wanting.

[44] Predictability is a necessary condition for punishment to achieve its goal of measured deterrence. *See* J. Bentham, *The Rationale of Punishment* 41 (1983); 4 W. Blackstone, *Commentaries on the Laws of England* 17 (1st ed. 1769).

[45] The fact that these "quasi-criminal" punitive damages are awarded in civil cases is no bar to the application of the vagueness doctrine. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). Thus, in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court struck down on vagueness grounds a Pennsylvania statute that authorized a jury, at its discretion and unguided by any clear standards, to impose the costs of a criminal prosecution on an acquitted defendant. The Court stated that whether the statute should be classified as civil or criminal was irrelevant to the vagueness analysis:

> Whatever label has been given to the [Pennsylvania statute], there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property . . . Implicit in [the Due Process Clause] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must accept.

Id. at 402-03.

1. *The Procedures Followed By The Courts Below Undermined Each Of The Core Values Served By The Void-For-Vagueness Doctrine Embodied In The Due Process Clause.*

The void-for-vagueness doctrine seeks to further several related constitutionally mandated goals: to ensure that laws are sufficiently understandable to provide adequate notice of potential penalties, *Grayned*, 455 U.S. at 358; to establish clear guidelines, preventing juries from merely "pursu[ing] their personal predilections" and "caprice," *Kolender*, 461 U.S. at 98; *Roberts* v. *United States Jaycees*, 478 U.S. 609, 629 (1984); and to permit "meaningful judicial review." *Roberts*, 478 U.S. at 629. In this case, it is clear that each of these requirements was violated by West Virginia's vague punitive damages scheme.

The jury instructions contained a broad invitation to award a random windfall to respondents as some undefined "compensation," J.A. 34, and they directed the jury to consider prejudicial and irrelevant information. See *supra* pp. 34-38. No established criteria guided either the trial court's or the appellate court's review of the punitive award. See, *e.g.*, *Roberts*, 478 U.S. at 629-30 (in finding that Minnesota's Human Rights Act

[46] This Court has indicated that criminal statutes require a higher degree of clarity to avoid being unconstitutionally vague than do statutes providing for civil penalties. *Village of Hoffman*, 455 U.S. at 498-99. *See also Garner* v. *White*, 726 F.2d 1274, 1278 (8th Cir. 1984) (state paraphernalia statutes subjected to stricter vagueness test than other business-oriented statutes due to imposition of criminal liability). Punitive damages are routinely characterized as "quasi-criminal," *Haslip*, 111 S. Ct. at 1043, or "penal." *See Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 298 (1989) (O'Connor, J., dissenting); *Smith* v. *Wade*, 461 U.S. 30, 86 (1983) (Rehnquist, J., dissenting).

was not unconstitutionally vague as applied, Court emphasized the Minnesota Supreme Court's use of "a number of specific and objective criteria . . . typically employed in [such cases] . . . . [T]hese familiar standards ensure[] that the reach of the statute is readily ascertainable"). See *supra* pp. 39-43. The West Virginia Supreme Court's review consisted of a patently subjective and vague determination of whether TXO had been "really mean" or "really stupid"—hardly a standard that provides any notice whatsoever to persons attempting to conform their conduct to the requirements of the law, and certainly not an approach that places any meaningful constraint on punitive awards. See *supra* pp. 41-43. This system devoid of "understandable meaning" or "legal standards" that courts must accept," *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966), is "a textbook example of the void-for-vagueness doctrine," *Haslip*, 111 S. Ct. at 1058 (O'Connor, J., dissenting), irrespective of whether it is examined with reference to the more stringent test of clarity demanded in the penal context, or a less strict standard.[47]

[47] The Court in *Haslip* rejected a void-for-vagueness argument put forward by the petitioner concerning that specific award. 111 S. Ct. at 1047 n.12. The sparse treatment of the issue did not, however, broadly reject such claims in other settings. Specifically, the Court observed that vagueness problems are more serious with respect to what conduct is a violation of law than with respect to what penalty attaches to a violation. *Id.* (distinguishing *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966)). In *Haslip*, of course, there was no question that the fraud at issue violated both Alabama's civil and criminal laws. Moreover, the punitive award was within a range of awards previously upheld for similar conduct. Accordingly, the notice argument was not well presented by the facts of *Haslip*, as is reflected in the amount of attention the claim received by this Court.

Here, by contrast, slander of title had never been explicitly recognized as a tort in West Virginia, and certainly slander of title without a finding of actual damage to title or actual malice had never been deemed an appropriate basis for any award, much less a punitive award. In addition, no reasonably intelligent person in any State could conceivably have anticipated that a proper punishment for slander of title could reach the level of $10 million for a single infraction. Unless this Court rejects its prior decisions indicating that the magnitude of the punishment is a component of the notice required by due process (*see, e.g., United States* v. *Batchelder*, 442 U.S. 114 (1979)), then the void-for-vagueness doctrine must have some vitality as applied to this case. If so, the punitive award here violates due process. Indeed, each evil sought to be avoided by the vagueness doctrine was realized in this case. *See Bankers Life & Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring in judgment) ("[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

2. *TXO Had No Notice That It Could Be Assessed $10 Million In Punitive Damages Under A Cause Of Action Never Previously Recognized In West Virginia.*

TXO had no notice in 1985—when the events at issue in this lawsuit transpired—that it could be liable for a multi-million-dollar punitive damage award if it chose to bring a quiet-title action to settle a business dispute.[48] Neither statute nor common law provided guidance or advance notice as to the potential for punitive damages of $10 million. As noted above, the largest punitive damages award ever affirmed by the West Virginia Supreme Court up until that date was $500,000. See Appendix A. Accordingly, TXO had no notice in 1985 that it could find itself liable for a punitive damage award over 20 times as large as any award ever affirmed prior to that time. See *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring) ("Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages it could expect to incur a $1.6 million punitive damages award"). Nor could TXO have anticipated that a

[48] Any belief that companies doing business in West Virginia today have such notice is illusory. Notice that conduct might subject someone to punitive damages of anywhere from $1 to $10 million is no notice at all; a "person of ordinary intelligence" will be unable to use that notice as a guide to the conduct of his affairs. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

punitive-to-compensatory ratio of 526, more than 50 times as large as any previous ratio that had been upheld, see *supra* p. 20, would be approved solely on the basis of a *post hoc* determination that TXO was "really mean."

The lack of any notice to TXO that it might be assessed $10 million is particularly flagrant in light of the fact that this case represents the first time the tort of slander of title had been recognized in West Virginia. *Cf. Waits* v. *Frito Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992) (punitive damages approved based in part on fact that the tort constituting the underlying cause of action was well established), *cert. denied*, No. 92-863, 1992 WL 353533 (U.S. Jan. 19, 1993). Moreover, in every other jurisdiction that has awarded punitive damages for the tort of slander of title, actual damages to title and *actual* malice have both been required. See Rec. 1500-1503, 1504-1506. The trial court did not require either of these elements to be proved, see J.A. 27 (TXO's proposed jury instruction no. 3) & J.A. 29 (TXO's proposed jury instruction no. 7), and the West Virginia Supreme Court affirmed. Pet. App. 20a. Even if the tort of slander of title had been predictable in West Virginia, the action of the trial court and the West Virginia Supreme Court in unexpectedly changing the elements of the tort, and then imposing a multi-million-dollar award for committing that "tort," was violative of due process. *Cf. Rabe* v. *Washington*, 405 U.S. 313 (1972).

At the end of the day, the procedure here suffered from the lack of appropriate jury guidance, the complete absence of any defined standards on review, the West Virginia Supreme Court's declaration of a new, wholly standardless "really mean"/"really stupid" test, a newly defined tort, and the greatly increased size and ratio of the punitive award. The combination of these factors made it impossible for TXO to anticipate this penalty, and thereby rendered the award void for failing to provide notice necessary to satisfy due process.

* * * *

Very simply, what this case presents is a jury that has acted not in implementation of any state purpose, but solely out of bias and prejudice, and a state court system that has refused to apply established constitutional protections against such jury conduct. The product of that system is a grossly excessive penalty that deprived TXO of its property without due process of law.

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals upholding the award of punitive damages should be reversed.

Respectfully submitted,

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APPENDICES

ADDENDUM

APPENDIX A

WEST VIRGINIA PUNITIVE DAMAGES AWARDS

PUNITIVE AWARDS AFFIRMED ON APPEAL

Case	Cause Of Action	Punitive Damages	Actual Damages	Ratio
Riddle v. *McGinnis*, 22 W. Va. 253 (1883)	Trespass on the case.	$3,000 [$43,714.26] [1]	—	N/A
Mayor v. *Frobe*, 22 S.E. 58 58 (W. Va. 1895)	Unlawful sales of intoxicating liquors injuring wife in her means of support.	$750 [$12,240]	—	N/A
Scott v. *Chesapeake & O. R.R.*, 27 S.E. 211 (W. Va. 1897)	Willfully and wantonly refusing to allow plaintiff to return valid ticket.	$250 [$4,080]	—	N/A
Davis v. *Chesapeake & O. Ry.*, 56 S.E. 400 (W. Va. 1907)	Trespass on the case.	$900 [$13,114.28]	—	N/A
Turk v. *Norfolk & W. Ry.*, 84 S.E. 569 (W. Va. 1915)	Assault; unlawful arrest and imprisonment.	$1,000 [$13,421.05]	$500 [$6,710.53]	2:1

[1] The figures in brackets represent the amount of the award as measured in 1991 dollars. The source for the 1991 dollar equivalents for awards granted between 1960 and 1991 was: U.S. Bureau of Labor Statistics, "Consumer Price Indexes by Major Groups: 1960-1991," in *Statistical Abstract of the United States: 1992* 469 (U.S. Bureau of the Census 1992). The Bureau of Labor Statistics Office of Prices and Living Conditions provided the 1991 dollar equivalents for the other awards, using official Consumer Price Index figures for awards granted between 1913 and 1959, and unofficial Bureau of Labor Statistics calculations for pre-1913 awards.

Case	Cause Of Action	Punitive Damages	Actual Damages	Ratio
Addair v. *Huffman*, 195 S.E.2d 739 (W. Va. 1973)	Wrongful execution of wages.	$1,500 [$4,601]	$250 [$767]	6:1
Leach v. *Biscayne Oil and Gas Co.*, 289 S.E.2d 197 (W. Va. 1982)	Trespass; damage to property.	$41,800 [$58,996]	—	N/A
Wells v. *Smith*, 297 S.E.2d 872 (W. Va. 1982)	Civil action to recover damages resulting from theft.	$10,000 [$14,113]	—	N/A
Mutafis v. *Erie Ins. Exchange*, 561 F. Supp. 192 (N.D. W. Va. 1983), aff'd, 775 F.2d 593 (4th Cir. 1985)	Violation of the West Virginia Unfair Trade Practices Act.	$20,000 [$27,349]	$15,000 [$20,563]	1.33:1
Painter v. *Raines Lincoln Mercury, Inc.*, 323 S.E.2d 596 (W. Va. 1984)	Fraudulent inducement to purchase property.	$9,200 [$12,060]	$1,200 [$1,574]	7.66:1
Bell v. *Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W. Va.), *cert. denied*, 474 U.S. 936 (1985)	Willful failure of insurance company to satisfy judgment against insured.	$25,000 [$31,645]	$53,491.85 [$68,793]	.46:1
McClung v. *Marion County Comm'n*, 360 S.E.2d 221 (W. Va. 1987)	Violation of state overtime wage statute; denial of procedural due process; retaliatory discharge.	$35,000 [$41,963]	$40,000 [$47,685]	.88:1
Muzelak v. *King Chevrolet, Inc.*, 368 S.E.2d 710 (W. Va. 1988)	Common law material misrepresentation.	$25,000 [$28,782]	$15,000 [$19,188]	1.66:1
Berry v. *Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367 (W. Va. 1989)	Willful and malicious failure to pay claim under insurance policy.	$500,000 [$549,193]	$125,000 [$137,298]	4:1
Jones v. *Credit Bureau of Huntington, Inc.*, 399 S.E.2d 694 (W. Va. 1990)	Claim under Fair Credit Reporting Act for incorrect reporting of business' credit-worthiness.	$42,500 [$44,288]	$4,000 [$4,170]	10.62:1
Goodwin v. *Thomas*, 403 S.E.2d 13 (W. Va. 1991)	Breach of contract and tortious destruction of property.	$25,000	$17,858.84	1.39:1
Jarvis v. *Modern Woodmen of Am.*, 406 S.E.2d 736 (W. Va. 1991)	Breach of duty to prepare accurately plaintiff's life insurance policy.	$500,000	$125,000	4:1
C.W. Development, Inc. v. *Structures, Inc. of W. Va.*, 408 S.E.2d 41 (W. Va. 1991)	Intentional interference with employment relationship.	$75,000	$24,154.30	3.1:1
Pote v. *Jarrell*, 412 S.E.2d 770 (W. Va. 1991)	Malicious prosecution and abuse of process.	$35,000	$12,000	2.9:1
Casillas v. *Tuscarora Land Co.*, 412 S.E.2d 792 (W. Va. 1991)	Common law negligence and fraud.	$200,000	$88,189	2.26:1
Hinerman v. *The Daily Gazette Co.*, 1992 WL 166350 (W. Va. July 15), *petition for cert. filed* Dec. 9, 1992	Libel.	$300,000	$75,000	4:1
Davis v. *Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992)	Asbestos-related injury.	$40,000	$66,000	.60:1

PUNITIVE AWARDS REVERSED ON APPEAL

Case	Cause Of Action	Punitive Damages	Actual Damages	Ratio
George v. *Norfolk & W. Ry.*, 92 S.E. 430 (W. Va. 1917)	False imprisonment.	$3,000 [$31,875]	—	N/A
Hess v. *Marinari*, 94 S.E. 968 (W. Va. 1918)	Assault.	$9,000 [$81,419.04]	—	N/A
Toler v. *Cassinelli*, 41 S.E.2d 672 (W. Va. 1947)	Action to recover damages suffered when landlord locked lessee out of apartment.	$1,000 [$6,250]	—	N/A
Ennis v. *Brawley*, 41 S.E.2d 680 (W. Va. 1947)	Assault.	$3,000 [$18,750]	$1 [$6.25]	3,000:1
Sprouse v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W. Va.), *cert. denied*, 423 U.S. 882 (1975)	Libel.	$500,000 [$1,265,000]	$250,000 [$632,500]	2:1
Shamblin's Ready Mix, Inc. v. *Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989)	Conversion.	$650,000 [$714,246]	$3,531 [$3,880]	184.08:1
Tasker v. *Moore*, 738 F.Supp. 1005 (S.D. W. Va. 1990)	Civil rights action against former Commissioner of Department of Corrections.	$200,000 [$208,482]	$32,500 [$33,878.33]	6.15:1
Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991)	Nuisance.	$105,000	—	N/A

APPENDIX B

PUNITIVE DAMAGES AWARDS FOR SLANDER OF TITLE AFFIRMED ON APPEAL

Case	Punitive Damages	Actual Damages	Ratio
Hopkins v. *Drowne*, 41 A. 567 (R.I. 1898)	$1,300 [$22,074][1]	$3,700 [$63,068]	.35:1
Lacroix v. *Villio*, 49 So. 20 (La. 1909)	$869.08 [$13,670]	$130.92 [$2,062]	6.63:1
Lynch v. *Kemp*, 49 P.2d 817 (Cal. 1935)	$250 [$2,582]	$500 [$5,165]	.50:1
Winn v. *Warner*, 193 S.W.2d 867 (Tex. Ct. Civ. App.), *rev'd*, 197 S.W.2d 338 (Tex. 1946), *on remand*, 199 S.W.2d 560 (Tex. Ct. Civ. App. 1947)	$11,500 [$72,910]	$23,000 [$145,820]	.50:1
Olsen v. *Kidman*, 235 P.2d 510 (Utah 1951)	$10 [$54.50]	—	N/A

[1] The figures in brackets represent the amount of the award as measured in 1991 dollars. The source for the 1991 dollar equivalents for awards granted between 1960 and 1991 was: U.S. Bureau of Labor Statistics, "Consumer Price Indexes by Major Groups: 1960-1991," in *Statistical Abstract of the United States: 1992* 469 (U.S. Bureau of the Census 1992). The Bureau of Labor Statistics Office of Prices and Living Conditions provided the 1991 dollar equivalents for the other awards, using official Consumer Price Index figures for awards granted between 1913 and 1959, and unofficial Bureau of Labor Statistics calculations for pre-1913 awards.

Case	Punitive Damages	Actual Damages	Ratio
Spencer v. *Harmon Enterprises, Inc.*, 44 Cal. Rptr. 683 (Cal. Dist. Ct. App. 1965)	$5,000 [$21,619]	$22,000 [$95,123]	.22:1
Glass v. *Gulf Oil Corp.*, 96 Cal. Rptr. 902 (Cal. Ct. App. 1970)	$6,500 [$22,817]	$5,000 [$17,551]	1.3:1
Glusman v. *Lieberman*, 285 So.2d 29 (Fla. Dist. Ct. App. 1973)	$2,500 [$7,668]	$6,611.20 [$20,280]	.37:1
Misco Leasing, Inc. v. *Keller*, 490 F.2d 545 (10th Cir. 1974)	$10,000 [$27,626]	$6,572 [$18,156]	1.52:1
Jumping Rainbow Ranch v. *Conklin*, 538 P.2d 1027 (Mont. 1975)	$1,000 [$2,531]	$4,000 [$10,126]	.25:1
Johnson v. *Doran*, 540 P.2d 306 (Mont. 1975)	$43,500 [$110,124]	$16,772 [$42,460]	2.59:1
Johnson v. *Ervin*, 225 S.E.2d 21 (Ga. 1976)	$150 [$359]	$250 [$598]	.60:1
Walker v. *Ruggles*, 540 S.W.2d 470 (Tex. Ct. Civ. App. 1976)	$1,500 [$3,590]	$2,000 [$4,787]	.75:1
Builders Equity Corp. v. *Hurwitz*, 530 F.2d 1072 (D.C. Cir. 1976)	$100 [$239]	$121,838.57 [$299,209]	.0008:1
Proctor v. *Gissendaner*, 579 F.2d 876 (5th iCr. 1978)	$31,560 [$65,927]	$8,440 [$17,675]	3.73:1

American Nat. Bank & Trust Co. v. *First Wis. Mortgage Trust*, 577 S.W.2d 312 (Tex. Ct. Civ. App. 1979)	$50,000 [$93,801]	$60,000 [$113,014]	.83:1
Dixon v. *Process Corp.*, 416 A.2d 1295 (Md. Ct. Spec. App. 1980)	$21,000 [$34,711]	—	N/A
Harper v. *Goodin*, 409 N.E.2d 1129 (Ind. Ct. App. 1980)	$2,500 [$4,132]	$385 [$637]	6.49:1
Martin-Trigona v. *Gouletas*, 634 F.2d 354, 356 n.4 (7th Cir.), *cert. denied*, 449 U.S. 1025 (1980) (describing earlier order)	$125,000 [$206,614]	$75,000 [$124,466]	1.66:1
Montgomery Properties v. *Economy Forms*, 305 N.W.2d 470 (Iowa 1981)	$36,000 [$53,940]	$18,644 [$27,948]	1.93:1
Zehner v. *Post Oak Oil Co.*, 640 P.2d 991 (Okla. Ct. App. 1981)	$17,900 [$26,820]	$6,400 [$9,613]	2.79:1
McDonald v. *Bennett*, 674 F.2d 1080 (5th Cir. 1982)	$300,000 [$423,419]	$98,905 [$139,594]	3.03:1
Display Fixtures Co. v. *R.L. Hatcher, Inc.*, 438 N.E.2d 26 (Ind. Ct. App. 1982)	$2,000 [$2,822]	$14,867.44 [$20,983]	.13:1
Summa Corp. v. *Greenspun*, 655 P.2d 513 (Nev. 1983)	$1,000,000 [$1,367,469]	—	N/A
M&I Bank of Westfield v. *Schaffrath*, 333 N.W.2d 733 (Wis. Ct. App. 1983) (unpublished opinion; text in Westlaw)	$1,000 [$1,368]	—	N/A
Soneff v. *Harlan*, 712 P.2d 1084 (Colo. Ct. App. 1986)	$800,000 [$994,160]	$90,358.02 [$112,288]	8.85:1

Case	Punitive Damages	Actual Damages	Ratio
City of Brady v. *Bennie*, 735 S.W.2d 275 (Tex. Ct. App. 1987)	$25,000 [$29,973]	$275,000 [$329,709]	.09:1
Castaic Clay Mfg. Co. v. *Dedes*, 240 Cal. Rptr. 652 (Cal. Ct. App. 1987)	$200,000 [$239,788]	$500,000 [$599,471]	.40:1
Hagan v. *Liberty Loan Corp.*, 423 N.W.2d 886 (Iowa Ct. App. 1988)	$32,000 [$36,842]	$32,000 [$36,842]	1:1
Williams v. *Jennings*, 755 S.W.2d 874 (Tex. Ct. App. 1988)	$65,000 [$74,835]	$23,075 [$26,566]	2.81:1
DeLeo v. *Anthony A. Nunes, Inc.*, 546 A.2d 1344 (R.I. 1988), *cert. denied*, 489 U.S. 1074 (1989).	$30,000 [$34,539] $7,000 [$8,509]	$89,421 [$102,951] $3,000 [$3,454]	.33:1 2.33:1
Peckham v. *Hirschfeld*, 570 A.2d 663 (R.I. 1990)	$25,000 [$26,052]	$21,664.72 [$22,576]	1.15:1
Peters Well Drilling Co. v. *Hanzula*, 575 A.2d 1375 (N.J. Super. Ct. App. Div. 1990)	$1,000 [$1,042]	$1,794.12 [$1,869]	.55:1
Bright v. *Gass*, 831 S.W.2d 149 (Ark. Ct. App. 1992)	$1,000	$2,075	.48:1
Tarrant Bank v. *Miller*, 833 S.W.2d 666 (Tex. Ct. App. 1992)	$10,000	$7,086.50	1.41:1

APPENDIX C

SELECTED STATE STATUTES PLACING LIMITATIONS ON PUNITIVE DAMAGES AWARDS

Category	State	Amount	Description	Cite
Real Property Related Actions	Alabama	Double damages	destruction of timber	Ala. Code § 9-13-62 (1987)
	California	Treble damages	waste	Cal. Civ. Proc. Code § 732 (Deering 1983)
		Treble damages	trespass to cut down or carry away trees or timber	Cal. Civ. Proc. Code § 733 (Deering 1983)
		Treble damages	wrongful injury to trees, timber, or underwood on land of another	Cal. Civ. Code § 3346 (Deering 1984)
		Treble damages	unlawful forcible entry	Cal. Civ. Proc. Code § 735 (Deering 1983)
	Colorado	Treble damages	violation of orders as to waste, diversions, and distribution of water	Colo. Rev. Stat. § 37-92-504 (1990)
	Illinois	Value of property	property owner subject to conservation right may be liable	Ill. Ann. Stat. ch. 30, para. 404 (Smith-Hurd Supp. 1992)

Category	State	Amount	Description	Cite
Real Property Related Actions (cont'd)	Illinois (cont'd)	Treble damages	cutting of timber or trees	Ill. Ann. Stat. ch. 96½, para. 9402 (Smith-Hurd Supp. 1992)
	Massachusetts	Treble damages	waste	Mass. Gen. Laws Ann. ch. 242 §§ 4, 6 (West 1988)
		Treble damages	willful cutting of trees on another's land	Mass. Gen. Laws Ann. ch. 242 § 7 (West 1988)
		Treble damages	unauthorized taking of shellfish	Mass. Gen. Laws Ann. ch. 130 § 63 (West 1991)
	Minnesota	Treble damages	waste	Minn. Stat. Ann. § 561.17 (West 1988)
		Treble damages	cutting down or carrying off wood or timber from another's property	Minn. Stat. Ann. § 561.04 (West Supp. 1993)
		Treble damages if voluntary or double damages if involuntary	violation of law against timber trespass on state lands	Minn. Stat. Ann. § 90.301 (West 1977 and Supp. 1992)
		Treble damages	failure of owner of animals to distrain them	Minn. Stat. Ann. § 561.09 (West 1988)
		Treble damages	permitting herd animals to run at large	Minn. Stat. Ann. § 346.16 (West 1990)

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		Treble damages	forcible eviction	Minn. Stat. Ann. § 557.08 (West 1988)
		Treble damages	forcible entry	Minn. Stat. Ann. § 557.09 (West 1988)
	New Jersey	Treble damages	waste	N.J. Stat. Ann. §§ 2A:65-1, 3, 5, 6 (West 1987)
	New York	Treble damages	cutting down or carrying off trees or timber from another's property	N.Y. Real Prop. Acts Law § 861 (McKinney 1979)
		$10 per tree or treble damages or both	cutting down trees on state land	N.Y. Envtl. Conserv. Law § 71-0703 (McKinney 1984)
		Treble damages	forcible eviction	N.Y. Real Prop. Acts Law § 853 (McKinney Supp. 1993)
	Virginia	Double damages	waste	Va. Code Ann. § 55-214 (Michie 1950)
		Treble damages	waste during pendency of suit to recover or charge land	Va. Code Ann. § 55-216 (Michie 1950)
		Double damages	cutting timber from another's property	Va. Code Ann. § 55-333 (Michie 1950)

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Category	State	Amount	Description	Cite
Real Property Related Actions (cont'd)	Virginia (cont'd)	Treble damages	if trespasser who took timber fails to make payment required under § 55-333	Va. Code Ann. § 55-334 (Michie 1950)
		$20, and for each succeeding trespass, double damages	trespass by animals onto another's land	Va. Code Ann. § 55-306 (Michie 1950)
		Treble damages	willful injury or obstruction of property of a public service corporation	Va. Code Ann. § 56-5 (Michie 1950)
	West Virginia	Treble damages	waste	W. Va. Code § 37-7-4 (1985)
		Treble damages	waste during pendency of suit to recover or charge land	W. Va. Code § 37-7-5 (1985)
		Treble damages	injuring or carrying away trees or timber from another's land	W. Va. Code § 61-3-48a (Supp. 1992)

Personal Injury	Alabama	$400,000	medical malpractice	Ala. Code § 6-5-544 (Supp. 1992)
	Arizona	Not available	if drug which caused harm was manufactured and labeled in accordance with Federal Food and Drug Administration regulations	Ariz. Rev. Stat. Ann. § 12-701 (1992)
	California	Double damages	water company that fails to comply with regulations is liable to inhabitants	Cal. Publ. Util. Code § 8203 (Deering 1990)
	Colorado	$250,000	limitation on noneconomic damages in medical malpractice action	Colo. Rev. Stat. § 13-64-302 (Supp. 1992)
		Not available	against health care professional if injuries result from use of drug approved by any state or federal agency or used in accordance with standards of prudent health care practitioners or if injury was caused by acts of others unless he/she specifically ordered or ratified act	Colo. Rev. Stat. § 13-64-302.5 (Supp. 1992)
	Kansas	$100,000	limitation on noneconomic damages in wrongful death action	Kan. Stat. Ann. § 60-1903 (Supp. 1991)

Category	State	Amount	Description	Cite
Personal Injury (cont'd)	Kansas (cont'd)	Lesser of 25% annual gross income of defendant or $3 million	medical malpractice	Kan. Stat. Ann. § 60-3402 (Supp. 1991)
	Florida	Treble damages	contractor liable for injuries resulting from his negligence, malfeasance, or misfeasance	Fla. Stat. Ann. § 768.0425 (West Supp. 1992)
	Illinois	Not available	medical malpractice	Ill. Ann. Stat. ch. 110, para. 2-1115 (Smith-Hurd 1990)
		Treble damages	liability to state for failure to provide remedial action for release of hazardous substance	Ill. Ann. Stat. ch. 111½, para. 1022.2 (Smith-Hurd Supp. 1992)
	Massachusetts	Treble damages	unlawful discharge of substance injurious to public health or tending to contaminate shellfish	Mass. Gen. Laws Ann. ch. 130 § 927 (West 1991)
		Treble damages	liability of residential property owner for failure to correct dangerous conditions caused by high level of lead on premises	Mass. Gen. Laws Ann. ch. 111 § 199 (West Supp. 1992)

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Minnesota	$400 each employee		employer liable for violation of statute governing occupational safety and health	Minn. Stat. Ann. § 182.666 (West Supp. 1992)
New Jersey	Not available		if drug or food which caused harm was licensed and approved by Federal Food and Drug Administration	N.J. Stat. Ann. § 2A:58C-5 (West 1987)
Ohio	Not available		if drug which caused harm was manufactured and labeled in accordance with Federal Food and Drug Administration regulations	Ohio Rev. Code § 2307.80 (1991)
	$200,000		medical malpractice cases not involving death	Ohio Rev. Code § 2307.43 (1991)
Oregon	Not available		in product liability action unless proven that defendant showed wanton disregard for health and safety of others	Or. Rev. Stat. § 30.925 (1991)
	Not available		against health care practitioner unless practitioner's conduct was malicious	Or. Rev. Stat. § 18.550 (1991)

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Category	State	Amount	Description	Cite
Personal Injury (cont'd)	Oregon (cont'd)	Not available	if drug which caused harm was manufactured and labeled in acocrdance with Federal Food and Drug Administration regulations	Or. Rev. Stat. § 30.927 (1991)
	Rhode Island	Not available	survival action	R.I. Gen. Laws § 9-1-8 (1985)
	South Dakota	$1 million	medical malpractice	S.D. Codified Laws Ann. § 21-3-11 (1987)
	Utah	Not available	if drug which caused harm was manufactured and labeled in accordance with Federal Food and Drug Administration regulations	Utah Code Ann. § 78-18-2 (1992)
Claims Involving Fraud or Deceit	Arizona	Double damages	willful misappropriation of a trade secret	Ariz. Rev. Stat. Ann. § 44-403 (1992)
	California	Double damages	willful and malicious misappropriation of a trade secret	Cal. Civ. Code § 3426.3 (Deering Supp. 1993)
		Treble damages	if defendant sold device on which he altered identification mark, purchaser may recover	Cal. Civ. Code § 1710.1 (Deering Supp. 1993)
		Treble damages	if injury or damage caused because goods or services were provided by unlicensed persons when license required	Cal. Civ. Proc. Code § 1029.8 (Deering Supp. 1993)
		Treble damages	forgery of trust deed	Cal. Civ. Proc. Code § 749 (Deering Supp. 1993)
		$100 to $1,000 for each act	real property lessor's retaliatory act if done with oppression or malice	Cal. Civ. Code § 1942.5 (Deering 1981)
Colorado		Not to exceed actual damages	malicious and fraudulent misappropriation of a trade secret	Colo. Rev. Stat. § 7-74-104 (1986)
		Greater of treble damages or $250	deceptive trade practice	Colo. Rev. Stat. § 6-1-113 (1992)
Florida		Double damages	willful misappropriation of a trade secret	Fla. Stat. Ann. § 688.004 (West 1990)
		Difference between amount claimed by lienor and amount actually due	fraudulent mechanic's lien	Fla. Stat. Ann. § 713.31 (West 1988 and Supp. 1992)
Illinois		Lesser of treble damages or $500	issuing check and failing to pay after written demand	Ill. Ann. Stat. ch. 38, para. 17-1a (Smith-Hurd Supp. 1992)

Category	State	Amount	Description	Cite
Claims Involving Fraud or Deceit (cont'd)	Illinois (cont'd)	Treble damages	willful violation of Illinois antitrust act	Ill. Ann. Stat. ch. 38, para. 762 (Smith-Hurd Supp. 1992)
		Treble damages	injury to franchisee or motor vehicle dealer due to engagement of unfair method of competition or deceptive act	Ill. Ann. Stat., ch. 96½ para. 9402 (Smith-Hurd Supp. 1992)
	Massachusetts	Greater of treble damages or $1,000	deceptive or misleading advertising by a private business school	Mass. Gen. Laws Ann. ch. 75D § 14 (West Supp. 1992)
		Greater of treble damages or $1,000	tampering with odometer with intent to defraud	Mass. Gen. Laws Ann. ch. 266 § 141 (West 1990)
		Treble damages	sale of personal property by deceit or fraud	Mass. Gen. Laws Ann. ch. 231 § 85J (West 1985)
		Double damages	liability to the Commonwealth for fraudulent antitrust claim	Mass. Gen. Laws Ann. ch. § 21 (Law. Co-op. 1985)
		Treble damages	unfair competition or deceptive trade practice	Mass. Gen. Laws Ann. ch. 93A § 11 (Law. Co-op. 1985 and Supp. 1992)
		Double damages	theft of a trade secret	Mass. Gen. Laws Ann. ch. 93 § 42 (Law. Co-op. 1985)
		Treble damages	knowingly using name, picture or portrait of another without his consent for advertisting purposes	Mass. Gen. Laws Ann. ch. 214 § 13A (West 1989)
Minnesota		Double damages	willful and malicious misappropriation of a trade secret	Minn. Stat. Ann. § 325C.03 (West Supp. 1992)
		Treble damages	violation of laws governing restraint of trade	Minn. Stat. Ann. § 325D.57 (West Supp. 1992)
		Treble damages	vendor of medical care's liability to state for willfully submitting case report, rate application, or claim for reimbursement with a false representation	Minn. Stat. Ann. § 256B.121 (West 1992)
New Jersey		Treble damages	violations of New Jersey Antitrust Act	N.J. Stat. Ann. § 56:9-12 (West 1989)
		Treble damages	appropriation of name, brand, trademark, reputation or goodwill of another	N.J. Stat. Ann. § 56:4-2 (West 1989)
		Treble damages	violation of Consumer Fraud Act	N.J. Stat. Ann. § 56:8-19 (West 1989)

Category	State	Amount	Description	Cite
Claims Involving Fraud or Deceit (cont'd)	New Jersey (cont'd)	Treble damages	insurance company can recover against violator of fraud prevention statute	N.J. Stat. Ann. § 17:33A-7 (West 1985)
		Double damages	real estate broker or salesman's engagement in deceptive sales methods or diversion of funds	N.J. Stat. Ann. § 45:15-16.23 (West 1978)
	New York	Treble damages	corporation's use of false statements to obtain payments for social services from public funds	N.Y. Soc. Serv. Law § 145-b (McKinney Supp. 1993)
Civil Remedies for Crimes	Arizona	Treble damages	racketeering	Ariz. Rev. Stat. Ann. § 13-2314 (1992)
	California	Treble damages	receiving stolen property	Cal. Penal Code § 496 (Deering Supp. 1993)
	Colorado	Greater of treble damages or $200	theft, robbery, burglary	Colo. Rev. Stat. § 18-4-405 (Supp. 1992)
		Treble damages	violation of Organized Crime Control Act	Colo. Rev. Stat. § 18-17-106 (Supp. 1992)
		Treble damages	intimidation or retaliation of or against person for testimony about to be given or given at an official proceeding	Colo. Rev. Stat. § 18-8-708 (1986)
Florida	Treble damages	receiving stolen property	Fla. Stat. Ann. § 812.035 (West Supp. 1992)	
	Treble damages	racketeering	Fla. Stat. Ann. § 895.05 (West Supp. 1992)	
	Treble damages	misleading solicitation of money	Fla. Stat. Ann. § 817.061 (West 1976)	
	Treble damages	evincing prejudice during the commission of a crime	Fla. Stat. Ann. § 775.085 (West 1992)	
Illinois	Treble damages	financial exploitation of an elderly or disabled person	Ill. Ann. Stat. ch. 38, para. 16-1.3 (Smith-Hurd Supp. 1992)	
Minnesota	Treble damages	rustling or theft of livestock	Minn. Stat. Ann. § 609.551 (West 1987)	
	Greater of treble damages or $1,500	receiving stolen property	Minn. Stat. Ann. § 609.53 (West 1987)	

APPENDIX D

Excerpt from Closing Argument of Wade T. Watson, counsel for respondent Tug Fork Land Company

June 29, 1990

* * * *

[Tr. 757] His Honor has instructed you that you may award punitive damages and I've indicated to you what punitive damages amount to. Now, just consider the wealth of this corporation. A corporation TXO's size—one of the largest corporations. And the reason for putting in the evidence of Mr. Conrad on that point is that that's how a jury considers the amount of punitive damages. This is a multi-million dollar corporation—even [758] a billion dollars in assets. When you think about fining this defendant, a corporation of this magnitude and this size, ladies and gentlemen, what would it take to keep them from doing this again? It's gonna take a lot more than just awarding those attorney's fees. It's gonna take a lot more than that. This corporation, a multi-million dollar corporation, ought to be fined in terms of what they understand that goes to their resources; and their resources are in the millions. Therefore, think about that in terms of assessing a punitive damage award against them. A million, twelve million dollars. Those kinds of numbers are not out of line when you talk about a corporation that has assets of something like a billion dollars.

* * * *

APPENDIX E

Excerpt from Closing Argument of G. David Brumfield, counsel for respondents Alliance Resources Corp., George King, and Grover Goode

June 29, 1990

* * * *

[Tr. 779] I—Okay. Now, what about punitive damages? The Judge has said for purposes to deter this company from doing this again and to punish it. And in doing so, you have to take into [Tr. 780] consideration their wealth, because a fine of a large multi-national corporation must be larger than the fine for an individual. Now, we only want what's fair, what's right. Now, when you go into your room to consider the damages, the money damages that the Judge says you should award, he'll give you a verdict and there's three lines for each of these people. Tug Fork, Alliance and Goode and King. And the compensatory damages are very simple, really. All they're asking for is to get their attorney's fees back. Sixty-nine hundred to Alliance, seventy-three hundred, Tug Fork, and Goode and King, thirty-seven hundred. But this case is about their misconduct. They make a big point, well, we didn't really take that much. Heck, it was a bad well. Well, I wonder what about the criminal that comes in here and says, shucks, I didn't know that that lady leaving the bank had already made her deposit when I held her up. I thought she had a full purse. Do you send them up the river any less? Is the guilty act any more? They wouldn't have gone to this elaborate scheme —No, they wouldn't now, because they thought this was a huge, gonna be a huge money-making lease. Gonna put lots of wells on it. That's why it was worth the scheme. And the punishment should fit it, and fit the wealth. Now, how much is the wealth? The expert— They wouldn't tell us how much. We had to go out and hire a guy. They wouldn't tell us anything about the

company records. You [Tr. 781] heard that. Said they weren't available. Do you believe that the board of directors, when they ask TXO Production Corp. how they're doing, says, we don't know? How much money you making? We don't know. What's your cash flow? We don't know. Do you file tax returns? No. That's what they told us. You heard the evidence. So we go out and we reconstruct the value of this company. A two billion dollar company. Have earnings of $225,000,000.00, average. Last year made $125,000,000.00 alone. Last year. Now, what's a good fine for a company like that? A hundred thousand? A million? You can do that if you think it's fair, because when you go back into your room and discuss the money damages the Judge has told you that you ought to award in this case, I'd like you to remember what I said. If someone speaks up, well, gee, that's too much money, or that's too small, remember what Mr. Brumfield said. I hope someone will speak up and say, remember what Mr. Brumfield said? It isn't really whether the verdict is too large or too small, too big or too little. It's whether it's fair. That's what we want. We want you to be fair.

Well, what is fair? You have a—If someone comes to town and intentionally doesn't put a quarter in the meter, stays here all day, town that needs it to pay for the police force and the fire department, they give them a fine. And at the end of the day they may have to pay a dollar. That persons reaches in [Tr. 782] his billfold at the end of the day and maybe he's got a hundred bucks in there. He doesn't want to have to pay that dollar, but he does, because he knows if he doesn't, the turn is they may take his license, they may bring him into court and he may end up having to pay a hundred dollar fine. So he pays that dollar. And the next time he comes to town next Saturday, he puts his quarter in the meter. That's a fair fine. The town didn't take everything from the individual, didn't ruin them, just took one percent of what that person had in cash. One percent. You can fine TXO one percent if you want, you can fine them one

dollar if you want. But I submit to you a one percent fine, the same as John Doe on this street, would be fair. That's twelve and a half million dollars, based on what they had left over. And their earnings was $225,000,000.00. I mean, yeah, their cash flow. Their surplus. So anything between twelve and a half million and twenty-two million is only one percent—the same as this poor guy who just tried to cheat a little bit. Now, that's a lot of money. I hope, like I said, you don't analyze this on a lot or a little, but fair. Right and wrong.

I think when you do that, that's all we ask. The decision is, well, look, is it really enough? It's fair. We need to stop people from stealing people's land. Fraudulent quit claim deeds. We need to stop this. We don't want this company, we don't want other companies doing this.

[Tr. 783] THE COURT: Wrap it up, Mr. Brumfield.

MR. BRUMFIELD: If you do that, and I believe that you will, after this small amount of compensatory damages for each of these defendants, fill in the blank on punitive damages for the amount that I've suggested.

Thank you.

* * * *

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Whether, on the specific facts of this case, the punitive damages award violated TXO's substantive due process rights.

2. Whether the procedures employed in this case with respect to the punitive damages award violated TXO's procedural due process rights.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A. Introduction

TXO's description of this case as one in which a party who suffered $19,000 in out-of-pocket losses was awarded $10 million in punitive damages ignores completely the record evidence and the West Virginia Supreme Court's analysis.

The reality of this case is that TXO embarked upon a three-month fraudulent scheme which included attempted subornation of perjury in an effort to misappropriate a stream of royalties worth between $5.0 million and $8.3 million that properly belonged to respondents. In the process, TXO attempted to circumvent West Virginia's system of market exchange and private property rights on which oil and natural gas development (indeed all commercial intercourse) depends. TXO's conduct was dangerous and, as the state supreme court found, reflected a "pattern and practice of fraud, trickery, and deceit" that threatened "millions of dollars" in harm. Pet. App. 40a.[1]

Fortunately, TXO's plan was foiled: respondents refused to capitulate to TXO's attempted extortion and defeated TXO's fraudulent scheme, at a cost of $19,000 in attorney's fees. Because the TXO scheme had an enormous expected gain and risked causing severe social harm, the West Virginia Supreme Court quite reasonably found that the jury's award of $10 million was "necessary," Pet. App. 40a, to provide adequate deterrence and retribution. The fact that this sum happened to be approximately 526 times the cost of defeating TXO's scheme is an arithmetic curiosity with absolutely no constitutional relevance.

TXO's *amici*, in a helpful, if somewhat morbid, illustration of the appropriateness of punitive damages here, explain that punitives far in excess of a compensatory award are warranted "where a defendant has engaged in heinous conduct with huge potential for harm, but which resulted in little actual harm (*e.g.*, the defendant

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[1] Citations to the Appendix to the Petition for Certiorari will be styled "Pet. App. ___a." Citations to the Joint Appendix will be styled "J.A. ___." Citations to the Brief of the Petitioner will be styled "Pet. Br. ___." Citations to the Appendix to Petitioner's Brief will be styled "Pet. Br. App. ___." Citations to the record and transcript below will be styled "Rec." and "Tr."

throws harmful acid at a person's face, but misses, causing only minimal clothing damage)." Brief of the American Automobile Manufacturers Ass'n, *et al.*, at 23 ("Auto Br."). *Amici* ignore the supreme irony that TXO is *precisely* like the assailant foiled only because a quick-thinking victim dodges the airborne acid.

TXO tries desperately to persuade this Court that "[t]his is th[e] case" in which the line on punitive damages should be drawn. Pet. Br. 6. But this is not the case that TXO claims it to be. As the Brief of 27 States as *Amici Curiae* Supporting Respondents ("States' Br.") demonstrates, drawing the line here would be a throwback to *Lochner v. New York*, 198 U.S. 45 (1905), and would undermine a longstanding common-law doctrine necessary to serve fundamental state interests.[2]

B. TXO's Secretive Scheme of Intentional Fraud Calculated to Steal Between $5.0 Million and $8.3 Million in Respondents' Property Rights

TXO's four-paragraph recitation of the facts (Pet. Br. 1-3) is woefully incomplete.

This case involves "the oil and gas development rights to 1,002.74 acres in McDowell County," West Virginia, called the "Blevins Tract." Pet. App. 7a. In 1984 and 1985, TXO's geologists became excited at the prospect of drilling this promising

[2] This case is *not* a symptom of the alleged "explosion in the frequency and size of punitive damages awards" attributable to "changes in the law" permitting "product liability and mass tort" actions and other innovations. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1066 (1991) (O'Connor, J., dissenting). This case involves an intentional tort (slander of title) that has existed since 1591. Pet. App. 14a. "The current debate over punitive damages does not involve intentional torts." Landes & Posner, "New Light on Punitive Damages," *Regulation* 33 (Oct. 1986). Indeed, some of TXO's *amici* lament what they see as the increasing award of punitive damages in products liability cases and yearn wistfully for the common-law days when punitive damages were awarded chiefly in intentional tort cases, without recognizing that *this is an intentional tort that has been eligible for punitive damages for hundreds of years. See, e.g.*, Auto Br. at 10-13; Brief of Product Liability Advisory Council, Inc., as *Amicus Curiae* in Support of Petitioner at 8-9 ("Prod. Liab. Br.").

tract as part of TXO's extensive Appalachian drilling operations.[3] The Blevins Tract was bordered by lucrative wells, and on that basis TXO geologists recommended that TXO "drill the Blevins # 1 as a field development well" which would have "a high probability of success." DX-3, Rec. 1729; *see also* Tr. 110-11, 547-48. A memo from Mike Good, the head of the TXO office in Charleston, written to a superior in Dallas, reported that the Blevins Tract was a "solid prospect[] with multi-pay potential," and that "[m]arkets are available . . . in the $3.00/Mcf [one thousand cubic feet of gas] range." DX-4, Rec. 1730; Tr. 672-73.

The revenues that TXO expected from the Blevins Tract were enormous. TXO did not drill wells unless it expected that at least 350,000 to 400,000 Mcf could be produced from each well. Tr. 536; *see, e.g.*, DX-6, Rec. 1735. Good's memo to Dallas, written on April 29, 1985 — just days before TXO set into motion its scheme of fraud and deceit — noted that benchmark wells adjacent to the Blevins Tract had reserves of 500,000 Mcf and up. DX-4, Rec. 1730. Given the anticipated market price of $3.00 per Mcf, TXO expected a total revenue stream of $1.5 million from each well. Many wells could be placed on the 1000-acre Blevins Tract without reducing each well's production — easily 15 wells and

[3] This area of West Virginia had long been known for its natural gas reserves. The Blevins Tract was originally held (pursuant to a royal patent) by Robert Morris, signer of the Declaration of Independence and financier of the Revolutionary War. George Washington was among the first to recognize the value of the "burning springs" in this area of West Virginia. Tr. 426. Active interest in the mineral rights to this valuable land commenced in the 1850s. Tr. 426. A "rush to develop the area" began in 1966. Tr. 24.

Despite TXO's suggestion that it had only "a small operation" in West Virginia, Pet. Br. 1-2, as part of its extensive Appalachian Basin exploration and drilling program, TXO was in fact "particularly active" in West Virginia, and had twenty-five employees based in Charleston, West Virginia. Tr. 380, 382. During the four years relevant to the conduct at issue, TXO drilled or took over 98 wells in West Virginia. Tr. 158-59. In particular, during this time TXO was making extensive efforts in West Virginia to drill "developmental wells" on lands such as the Blevins Tract, to exploit "new reserves off of current producing wells." Tr. 628. TXO's efforts focused on McDowell County, Tr. 562-63, and more specifically on the Blevins Tract, whose 1,000-acre size and proximity to proven reserves made it an extremely attractive prospect. Tr. 547-48.

perhaps as many as 25.[4] Thus, the value of the total income stream that TXO would expect from the Blevins Tract was somewhere between $22.5 million (with 15 wells) and $37.5 million (with 25 wells).[5]

TXO could not drill the Blevins Tract, of course, until it acquired the right to do so. At that time, the rights to drill for oil and natural gas on the Blevins Tract were held by respondent Alliance Resources Corp., Tr. 566,[6] a small but experienced Texas-

[4] Expert testimony presented by Alliance established that "[f]ifteen [wells] could certainly be put on this property" and if "properly spaced . . . shouldn't impact on one another at all," Tr. 102 — and that as many as 25 wells might be placed on the Blevins Tract. Tr. 99. The calculations of TXO's own expert were consistent with this testimony, indicating that 22 wells could be placed on the tract. *See* Tr. 535-36 (estimating that approximately 45 acres of drainage were necessary for each well, yielding the potential for 22 wells on the 1000-acre tract). Good confirmed that TXO planned to drill multiple wells on the Blevins Tract. Tr. 673.

[5] *After* TXO's scheme was foiled, and TXO was facing a counterclaim for slander of title, TXO did its best to minimize the value of the Blevins Tract. As a litigation tactic, TXO hid evidence of the value of the asset that it had sought to appropriate. TXO refused to produce any gas from the well (so that its profitability could not be thoroughly appraised), and told Alliance that "the well . . . would not be put in production until the law suit was cleared up," Tr. 91, and as a result Alliance got "not a penny" from the well. Tr. 90. TXO sold all its *other* wells but kept control of the well on the Blevins Tract, Tr. 180, and just one month before trial — over the objections of one of the respondents — TXO pumped cement down the well, plugging it forever and making it impossible further to assess its potential. Tr. 106-07, 175-76.

Despite these efforts to hide the value of the Blevins Tract, the jury was apprised of an internal TXO letter written in July 1986 (nine months after the well was drilled) showing that TXO considered the Blevins Tract to be viable for multiple wells. *See* Tr. 544-46. Expert testimony established that even based on the well's allegedly disappointing results, and even at the lower market price that existed at the time of trial ($2.50 per Mcf), the well would have returned $911,750 in gross revenues — for a total of $13,676,250 in gross revenues for the Blevins Tract as a whole (assuming conservatively 15 wells), of which respondents would have received about $3 million. Tr. 100, 105, 116. In any event, as explained in Part I-A-3, *infra*, the relevant valuation of the Blevins Tract and respondents' royalty share is the value that TXO *expected* at the time it committed the tort at issue.

[6] Other interests in the oil and gas rights to the Blevins Tract were held by respondent Tug Fork Land Company, which owned the oil and gas rights, and respondents George King and Grover C. Goode, who had leased these

based oil and gas development firm staffed by Brian Robinson and one other employee. Tr. 59. Like TXO, Alliance in the mid-1980s was actively developing wells in West Virginia. Tr. 60-62. In late 1984, TXO approached Alliance seeking to purchase these rights. After Alliance initially declined, TXO upped the ante, making Alliance a "phenomenal" offer under pressure from TXO's geologists, who were eager to drill the field.[7]

On April 2, 1985, TXO and Alliance reached an agreement. Alliance assigned its rights on the Blevins Tract to TXO in exchange for an up-front payment of $20,000 plus the right to 22 percent of the gross revenues from all natural gas ever produced from the tract. Pet. App. 8a. Alliance did not guarantee good title to the land. Instead, Alliance agreed that, if TXO's counsel found any title problems with the Blevins Tract, TXO would have the absolute right to withdraw from the deal, and Alliance would be obliged to pay back the $20,000 up-front money. *See* Pet. App. 8a-9a n.1.

Not long after the ink on the deal was dry, TXO embarked on a clandestine plan to recapture the "phenomenal" 22 percent share of gross revenues that it had been forced to offer Alliance in order to obtain the rights to the Blevins Tract. Alliance's share, based on projections of the value of the tract, represented a stream of revenue

rights (under the name "Georgia Fuels") and thereafter assigned their lease to Alliance. *See* Pet. App. 7a. For simplicity, the term "Alliance" will be used in contexts involving the collective ownership interest of all respondents.

[7] Alliance, intending to drill the property itself, initially declined to assign its lease to TXO, instead proposing a joint venture in which TXO would have paid 75 percent of the drilling costs, reaping 80.25 percent of recovered gas and paying the remainder (19.75 percent of the gas) in lease royalties to Alliance. Pet. App. 8a; Tr. 64-67. TXO turned down Alliance's offer, indicating that it "considered [this 19.25 percent burden] to be too great." Tr. 68. *See also* Rec. 1713 (internal TXO document rejecting offer because "burdens determined to be too large for Joint Venture"). "Only a few months later, in February, 1985, however, TXO approached Mr. Robinson with" what Robinson quickly accepted as "a 'phenomenal' offer" to buy out Robinson's interest. Pet. App. 8a; Tr. 70-71. The TXO employee with whom Robinson negotiated explained to Robinson that the reason for TXO's sudden intense interest was "that there was a new senior vice president in charge of TXO [P]roduction in West Virginia." Tr. 68-69. In reality, as another TXO employee admitted at trial, the "change in [TXO's] position between the two points in time" occurred because "[t]he geologists were pushing for it a little bit harder." Tr. 569.

worth between $5.0 million and $8.3 million (22 percent of the total expected gross income stream, *see* pp. 3-4, *supra*.)

TXO set out to build a phony chain of title, using a fraudulent scheme that had a long and notorious history in West Virginia. TXO's chief title attorney on the Alliance case admitted in testimony at trial that he knew that the State's system for determining ownership of mineral rights had once been threatened by widespread land fraud. Land thieves, he noted, "would try to build a title for themselves," typically by getting someone "to give them a quit claim deed." Tr. 427. Indeed, land fraud involving quitclaim deeds had been a problem specifically in McDowell County. Tr. 436-37.

TXO resorted to this classic means of fraud based on a theory — concocted by TXO officials — that a predecessor in Alliance's title had inadvertently conveyed the right to drill for oil and gas in a 1958 deed which conveyed coal exploitation rights to coal operator Leo J. Signaigo, Jr. *See* Pet. App. 9a. TXO concealed this theory from Alliance for several months while it maneuvered to position itself as the titleholder under the Signaigo deed, and then surprised Alliance with its fait accompli in a letter dated July 12, 1985. Rec. 1616-17 (PX-4, letter from Larry L. Skeen).

Paragraph 1 of the 1958 deed did transfer to Signaigo "all the coal *and other minerals and mineral substances* in, on and underlying the" Blevins Tract. Pet. App. 10a (emphasis added). Paragraph 6, however, specifically reserved to the landowner (whose interest Alliance ultimately acquired) "the right to bore for and remove *all the oil and gas* underlying" the Blevins Tract. *Id.* (emphasis added). As both courts below found, this language in ¶ 6 was unambiguous in reserving to Alliance's predecessor the rights to the oil and gas underlying the Blevins Tract, and TXO's position was, as a legal matter, "ridiculous." Pet. App. 10a-11a & n.3; *see also* J.A. 12. Choosing simply to ignore ¶ 6, TXO focused exclusively on a separate and independent reservation clause in ¶ 2(a), which TXO underlined as the "relevant language" in a copy of the 1958 deed attached to the July 12 letter to Robinson. Pet. App. 46a. As one respondent testified at trial: TXO "refused at all times, even to look at the fact that there may be some paragraph in here besides paragraph 2. . . . [O]bviously they were just ignoring the rest of the deed. In other words, this one suited their purposes, let's don't go any further." Tr. 29-30.

TXO then set out to find support for its theory from Mr. Signaigo and others to whom Mr. Signaigo had sold his rights. It commenced this effort approximately a month after signing its deal with Alliance, and days after a key report confirming the value of the Blevins Tract (*see* DX-4, Rec. 1730, dated April 29, 1985). Detailed contemporaneous notes of the responsible TXO employee, Duncan Wood (PX-12; Tr. 1644), showed that TXO's effort came up empty. On May 6, 1985, Mr. Wood:

> (1) "Called . . . Mr. Signaigo [who] said he thought he had only purchased coal and that he had sold it to . . . Hawley Coal Mining Corp."
>
> (2) "Called . . . [head of] Hawley," and "to his knowledge they had only purchased the coal," and then "had sold what they owned to Virginia Crews Coal Company."
>
> (3) "Called [Virginia Crews' general manager] . . . who informed me that they (Virginia Crews) believed they had only purchased the coal under the acreage *as did all the other predecessors in title since Tug Fork*."

Rec. 1645 (emphasis added). Testifying at trial, Wood confirmed that "[e]veryone here told [Wood] that nobody in this chain of title had the gas." Tr. 596; *see also* Pet. App. 20a.[8]

Undaunted, TXO then proceeded to entice (or, less charitably, to bribe) Virginia Crews to act as if it *might* have an interest in the oil and gas, and to "sell" TXO a quitclaim deed. Tr. 427. Even though Virginia Crews had already told TXO that it owned no oil or gas rights, TXO attempted to persuade Virginia Crews to the contrary and to sell TXO a quitclaim deed. As Wood's notes reveal, TXO volunteered information about "a cloud on [TXO's] title" and said that "it appeared by the language of the conveyance that they [Virginia Crews] owned the oil & gas." Rec. 1645-46.

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[8] Specifically, Wood agreed that "Signaigo told [Wood] very plainly that he didn't have any gas underlying that property" and "told [Wood] he'd only purchased the coal," Tr. 592; that the Hawley official "told [Wood] to his knowledge they'd only purchased the coal under the 1,000 acre tract," Tr. 594; and that the head of Virginia Crews "informed [Wood] that they believed they had only purchased the coal under the acreage." Tr. 596.

Wood confirmed the accuracy of these notes at trial, explaining how he attempted to "talk Virginia Crews into believing they did have" the oil and gas. Tr. 597.

TXO then offered to buy a quitclaim deed *in TXO's name*. Virginia Crews expressed suspicion at TXO's overture and had its lawyers research the title for more than a month. Rec. 1648, 1651. It ultimately decided to accept $6,000 from TXO in exchange for the quitclaim deed, but it flatly refused to warrant title to the property, evidently believing after careful study that it had no colorable claim of title. Tr. 573-75; Rec. 1651-52.

After securing Virginia Crews' agreement to convey this quitclaim deed, TXO set out to suborn perjury from Signaigo, in an apparent effort to bolster the plausibility of its title theory. TXO drew up a pre-printed affidavit for Signaigo to sign which "*falsely* stated that Mr. Signaigo could not say whether the oil and gas rights were included in the 1958 deed," flatly contradicting his earlier statements to TXO. Pet. App. 9a (emphasis in original). The affidavit was presented by Wood, a notary public, whom, of course, Signaigo had earlier told that he did not believe he owned any oil or gas. Signaigo refused to swear to a lie and did not sign the affidavit. Rec. 1649, Tr. 605.

As the court below recognized, these actions reflected no mere "excess of zeal by poorly supervised, low level employees," Pet. App. 20a, but were instead part of a concerted corporate strategy approved at the highest echelons. A key internal TXO memorandum dated May 30, 1985, one day after a TXO geologist's glowing report on the Blevins Tract (DX-3, Rec. 1729), shows that TXO officials, including corporate counsel in Dallas, decided to assert a claim to the Blevins Tract based on the quitclaim deed in order to obtain "a chance of the court conferring TXO with 100% interest." PX-8, Rec. 1635. In the words of the West Virginia Supreme Court, this was nothing less than "an attempt to steal [respondents'] land." Pet. App. 20a. TXO's goal was to trigger judicial error based on the evidence TXO had itself manufactured. Indeed, the May 30 decision to go ahead with the fraudulent scheme was made only days before TXO attempted to obtain the false affidavit from Signaigo.

TXO actually received the quitclaim deed from Virginia Crews on July 1, 1985. Tr. 576. But it was careful to complete three steps before actually filing the deed. First, top TXO official Mike

Good completed a final Operations Package confirming the enormous revenue potential of the Blevins Tract. *See* DX-6, Rec. 1735. Second, the key TXO official in charge of the plan, including Dallas corporate counsel, held a conference call on July 10 to cover (as Wood's notes reveal) "all the pertinent facts." Rec. 1652. Finally, the TXO officials made sure that Good "was apprised of the situation" and "concurred with the actions being taken." *Id.* Then, on July 11, 1985, the quitclaim deed was filed.

Armed with the quitclaim deed, TXO sprang its trap on an unsuspecting Alliance.[9] The day the quitclaim deed was recorded, July 11, TXO employee Duncan Wood called Robinson, saying that he was "following orders on instructions from Dallas," Tr. 124, to put Robinson on notice of an alleged title defect on the Blevins Tract, and to inform him of the quitclaim deed. Tr. 80, 124. The following day, TXO's counsel wrote a threatening letter, *see* p. 6, *supra*, contending that TXO might well be "the owner of the oil and

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[9] Although TXO claims that "nothing about this case indicates that TXO's misconduct was easily concealed," Pet. Br. 31, TXO in fact concealed its scheme for more than three months, from April 2 to July 11, 1985. Prior to July 11, despite Robinson's frequent contact with Charleston TXO staff over TXO's seemingly endless delay in paying the $20,000 up-front money owed since April 2, TXO breathed not a word of the alleged title problem. Pet. App. 11a.

TXO paid Alliance using a "sight draft," which Robinson thought was a check but which was really a fancy "I.O.U." with a built-in stop payment. Tr. 73-74. Robinson took it to the bank, but it "wouldn't cash." Alliance's bank was forced to call TXO "to see if they're willing . . . to pay the sight draft." Tr. 74. They were not. For three full months Alliance and its bank "repeatedly" attempted to have the sight draft paid. Tr. 75. Robinson regularly called TXO employees in Charleston, asking: "[W]hat's wrong here? How come I'm not being paid?" Tr. 76. TXO provided the typical "list of excuses a mile long" used in similar schemes. Pet. App. 23a. Robinson was told "[n]ot to worry about it, that it was just some bureaucratic hangup in Dallas." "[T]hey apologized," and said that "it would all be taken care of and that they were on top of it," and that he should "[j]ust remain patient." Tr. 76.

The delay, however, was not a product of "normal corporate bureaucracy," as TXO represented. Tr. 78. Rather, an internal memo summarizing the key May 30 conference call during which TXO's scheme was discussed reveals a corporate decision to "pay the draft to Alliance," by then long overdue, only *after* all details of the scheme were worked out. Rec. 1635. The sight draft finally cleared around July 1, 1985. Tr. 78.

gas in place." Rec. 1617. TXO's attorney warned respondents that, unless they could "work out a mutually satisfactory settlement concerning this issue, I have been instructed to prepare and file a suit" to "determin[e] the ownership . . . [and thus] the distribution — of possible oil and gas revenues." Rec. 1617.

TXO called a meeting with Robinson and several TXO officials at which, Robinson testified, TXO's counsel "began immediately very aggressively explaining to me how under West Virginia law I did not have a valid lease," and "sticking [highlighted portions of the pertinent law] under my nose," saying: "Read this, read this, read this. You don't have a lease." Tr. 83; *see also* Pet. App. 12a. The point of the meeting was that TXO "wanted concessions" on the 22 percent royalty interest TXO owed Alliance, or else TXO was "going to file suit" and was "going to try to remove us entirely from this lease." Tr. 84. Because "all of us would be totally wiped out with regard to this lease," Robinson testified that he "felt like [he] was being ambushed," Tr. 86, but he stood firm despite TXO's extortion attempt.

Outraged by TXO's "blackmail," Tr. 39, one respondent threatened to sue for punitive damages unless TXO desisted. Rec. 1656. TXO was undeterred by the warning and continued its pattern of threats. Rec. 1640-41. Robinson refused to capitulate.

TXO's brief suggests that removing clouds on title is good business practice, *see* Pet. Br. 3, as the West Virginia Supreme Court readily agreed. *See* Pet. App. 12a. But standard business practice for quieting title does not involve attempting to steal from the lessor, or suborning perjury.[10]

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[10] The parties' own April 2 agreement, for example, expressly provided a fail-safe remedy for any title problem: TXO could have backed out of the agreement altogether, and Alliance would have returned all of TXO's up-front money. *See* p. 5, *supra*. At minimum, as TXO's expert witness admitted at trial, it is standard practice in the event of a title problem immediately to notify the leaseholder so that all the parties working together can solve whatever problems exist. Tr. 716-17. In this case, any bona fide title problem could easily have been solved by TXO's obtaining written disclaimers from Signaigo and his successors in interest, memorializing their earlier statements that they owned no oil or gas rights. Indeed, TXO's title attorneys had suggested this option at the time. Tr. 584-87. Finally, TXO's expert witnesses on title problems admitted that TXO could have obtained a quitclaim deed directly in the name of its lessor, thus bringing about unity of title and protecting the arrangement between TXO and Alliance, rather than itself securing a quitclaim that it could use to coerce alterations in its deal with Alliance. Tr. 520, 701.

In sum, the record below strongly supports the West Virginia Supreme Court's finding that TXO made calculated, clandestine attempts, through "unsavory and malicious practices," Pet. App. 20a, to build a phony chain of title that slandered Alliance's title, in an attempt to wipe out, or at least reduce, the royalties that TXO was obligated to pay. Pet. App. 7a, 20a.

C. The Trial and Appellate Court Proceedings That Produced, and Confirmed the Necessity of, a $10 Million Punitive Damages Award

TXO lost its declaratory judgment action. J.A. 12. The court found, as Signaigo and his successors in title had insisted, that the rights they bought did not include oil and gas, given the clear reservation of these rights in ¶ 6 of the 1958 deed. Consequently, TXO's quitclaim deed from Virginia Crews was a nullity, and Alliance retained its 22 percent interest in the Blevins Tract.

On trial of Alliance's counterclaim for slander of title and punitive damages, TXO chose what can only be described as a "Big Lie" strategy — completely denying any wrongdoing and claiming a "good faith" mistake in filing the quitclaim deed. Pet. App. 26a. TXO adheres to that strategy before this Court, claiming simply that "TXO's attorneys opined that title was not clear," and "[b]ased on its attorneys' advice, therefore, TXO obtained and recorded a quitclaim deed," after which "[t]he parties were unable to reach any agreement" and a lawsuit followed. Pet. Br. 2-3.

Huge gaps in this "good faith" story were exposed at trial. The head of TXO's Charleston office, Mike Good, attempted to persuade the jury that he had been forthright with Alliance, keeping it informed at all times. Tr. 634-35. Yet he was forced to admit that the July 11 call, made *after* the recording of the quitclaim deed, was the first notice to Alliance that there was any question with respect to title. Tr. 654; *see also* Tr. 84-85, 145. After TXO's counsel confirmed that TXO had deliberately and carefully concealed the supposed problem from Alliance until July 11, Tr. 457, Good was further forced to admit that his threatening letter of August 15 had been false in claiming that "[a]s soon as we were advised of the problem by our attorney we advised you by letter." PX-11, at Rec. 1642; Tr. 654.

Even more damaging to TXO's claim of "good faith" was Good's admission that *he* at all times knew that Alliance held the rights to the gas. Tr. 638, 657. Despite a May 30 internal TXO memo noting an explicit corporate objective of obtaining "a chance of the court conferring TXO with 100% interest" on which "Good concurs" (PX-8, Rec. 1635), Good told the jury that he had fully intended to honor the 22 percent royalty commitment even if a court had ruled that TXO owned all rights to the gas! Tr. 667. No evidence supported this assertion.

The testimony of Duncan Wood, the TXO employee personally handling many aspects of the case, further demonstrated TXO's bad faith. Wood was the notary public sent to Signaigo's home to swear him to a lie. Prior to Wood's testimony at trial, TXO evidently was unaware that *respondents had a copy*, saved by Signaigo, of this false affidavit. At trial Wood pretended that the purpose of the trip was to get Signaigo to confirm his earlier oral statement to Wood "that he had *not* bought the oil and gas." Tr. 601 (emphasis added). The actual affidavit was then produced for Wood, judge, and jury to see. Wood was forced to read the affidavit to the jury, which would have had Signaigo saying he "did not know" whether he had bought the oil and gas, and guaranteeing that if called at trial he "could not agree" to support Alliance's interpretation of the 1958 deed. Tr. 604. Wood was further forced to admit that he had asked Signaigo to swear to the affidavit, *knowing* that the affidavit did not state what Signaigo had earlier told him. Tr. 605-07.

Also rebutting the theory that TXO had simply made a mistake was the evidence at trial establishing that actions taken toward Alliance were typical of TXO's "pattern and practice . . . to defraud and coerce those in positions of unequal bargaining power *vis a vis* TXO's superior legal firepower." Pet. App. 20a. Indeed, so strong was this evidence that the court below recognized that, if left unchecked, TXO's chronic wrongdoing would inflict "millions of dollars in damage to other victims." Pet. App. 40a.

Using its control as operator of wells, TXO had repeatedly gone to extreme lengths secretly to cheat its lessors and other business partners out of royalties that TXO was contractually obligated to pay. For example, on one well in Texas, TXO was contractually committed to pay a one-eighth royalty to its lessors on "all oil and gas produced." Tr. 201, 211, 218-19, 226-28. For five years, however, TXO falsely represented to the royalty owners that *no* gas

was being produced, to reduce its payment to only $6.41 per year in "shut-in royalty checks." Tr. 191, 193, 204, 215; Pet. App. 22a-23a.[11]

The record further revealed that in 1988 TXO started production in Louisiana without first making an attempt to secure a lease from Carrie Calloway, "an elderly, functionally illiterate woman." Pet. App. 22a; Tr. 238, 249. Calloway's four acres gave her the right (after paying her share of costs) to 6/10ths of 1 percent of the gas from TXO's nearby well. Tr. 242-43. In late February 1988 her son had an attorney contact TXO to open negotiations about a possible lease of her rights to TXO. Tr. 235, 241. When TXO employees nevertheless arrived at her doorstep a week later to talk directly with her, she told them to contact her lawyer. Tr. 238. They persisted, falsely claiming that she had to sign a paper or else "her neighbors couldn't get paid for their oil and gas." She signed the paper. Tr. 239-40. Later that day, after learning what TXO had done, her son contacted the attorney, but because Mrs. Calloway's reading comprehension was limited to words like "cat" and "dog," and because TXO had failed to leave a copy of the paper, the attorney could not determine what she had signed. Tr. 235, 240. Suspecting that it was a lease, her attorney rushed to the registrar's office to block the filing of the paper, but discovered that TXO had beaten him to it, and had recorded a standard 1/8th royalty lease that stripped Mrs. Calloway of 7/8ths of her revenue rights from her own land.

The attorney then made a personal trip to TXO regional headquarters, confident that "this national company" was not "going to take advantage of Mrs. Calloway" over "such a small and insignificant part" of the gas rights and that the matter could be resolved amicably. Tr. 253. But the responsible supervisor said that he "didn't think his people had done anything wrong." Tr. 244. Her attorney was told: "[I]t's just a gamesmanship type

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[11] A woman living nearby happened to see a "flare burning on this well" and alerted the royalty owners, who discovered that "a tremendous amount of gas had been produced" during these five years. Tr. 191-92. Only after being sued did TXO make up the lost royalties. Tr. 200, 218. After TXO promised never to do it again, Tr. 217, 227, in 1990 the royalty owners discovered "the same thing again. They're tendering the shut-in royalty checks and the well's producing." Tr. 220.

thing." "If we can beat you, you know, we're going to beat you." Tr. 246.[12]

Further testimony revealed that even in its home state of Texas, TXO was not regarded "very well at all" by royalty owners. Tr. 202. It failed to honor written agreements. Tr. 263. Its infamous reputation for "failure to pay royalties" and "unfair practices" became so pronounced that landowners began writing oil and gas leases to bar any assignment of drilling rights to TXO. Tr. 274-75. Such was the evidence at trial.

TXO raised no relevant objections to the jury instructions and in fact was content to have punitive damages assessed against it under an instruction that provided no guidance at all to the jury. Nonetheless, on *Alliance*'s motion, the court issued an instruction that gave the jury much more guidance than its counterpart in *Haslip*. In closing argument, Alliance's counsel contended that the

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[12] Mrs. Calloway was forced to sue, and then to settle for only a 1/4th royalty from her land, Tr. 245, the victim of what her attorney called "trickery, chicanery, the worst type of deception." Tr. 245.

Several other examples of TXO's cheating of its royalty holders and other partners were presented at trial. *See, e.g.*, Pet. App. 22a; Tr. 264-65 (TXO refused to pay its partner its production share during the first year, giving it a "list of excuses a mile long," including "we don't know if the title's good to the tract" even though it had been "cured before the well was drilled." Although TXO clearly owed its partner $150,000 to $200,000, TXO threatened to sue its partner for $50,000 in expenses.); Tr. 265-66 (TXO greatly delayed royalty payments with a list of "novel excuses" like "we're not paying anybody," or "the computer's down, we just changed systems, the title hadn't been cured."); Tr. 267-69 (without any legitimate excuse, for several years TXO ignored its obligation to inform its partners of valuable excess gas that they had the right to sell, and instead sold the gas for its own profit.); Tr. 273-74 (TXO refused to pay royalty owners "for several years"; although they made repeated demands on TXO, "[it] just went on and on and on," and the royalty owners were forced to sue for the royalties.").

Similarly, other examples of TXO's fraud and blackmail tactics were presented at trial. For example, in Oklahoma TXO used "fraud and misrepresentation," Pet. App. 882, and "whatever it takes to get it done," Tr. 306, in beating out another company for the right to drill. TXO falsely "acted like it owned an interest to get somebody to give it an interest" so that it could obtain authority to drill. Tr. 302. Even after *this* interest lapsed, in a successful extortion move TXO filed legal protests against its rival, saying in effect, "I won't fight you and hold you up for two years and keep you from doing what you are entitled to do, if you will pay me off." Tr. 303. Then, TXO turned around and claimed that the concession it won entitled TXO to all of its rival's *other* drilling rights in the area. Tr. 304.

failure of TXO's scheme did not absolve TXO of blame, Pet. Br. App. 23a, and stressed, "We need to stop people from stealing other people's land. Fraudulent quit claim deeds. We need to stop this." Pet. App. 25a. After the verdict, TXO's scattershot post-trial motion listed 19 grounds, *one* of which was that the verdict was a "constitutional denial of due process and an excessive fine." TXO Post-Trial Brief at 6. In a hearing held on the record, the trial court made clear its reasons for deciding that the verdict was not excessive. Tr. 792-818.

On appeal, TXO procedurally defaulted its claim in the West Virginia Supreme Court, but the court nonetheless entertained it and provided a searching review based on its decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), which extends procedural protections beyond what *Haslip* requires. The court was hardly an unsympathetic audience for TXO: the opinion below was written by an outspoken *critic* of punitive damages lauded by the *Wall Street Journal* for his gusto in overturning punitive damages verdicts, and the court has proven its willingness to reverse or reduce such awards.[13] The court affirmed the award here as "necessary" to provide deterrence and retribution, based on "the potential harm [of] TXO's actions," "the maliciousness" of its conduct, and "the penalty necessary to discourage TXO from undertaking such endeavors in the future." *Id.* at 39a-40a. The court suggested that where a defendant has not "intentionally committed mean-spirited and harmful acts," *id.* at 39a, but has merely been "really stupid," i.e., has exhibited "extreme

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[13] *See* pp. 46-47, *infra*. *See also* Gordon Crovitz, "High Court Mumbled, But Punitives Are At Risk," *Wall St. J.*, Dec. 18, 1991, at A15 (reporting that Justice Neely's dismissal of several punitive damages cases "suggests that his state, which can't afford to scare off business, has had enough of arbitrary punitive damages" and quoting Neely's disapproval of the large verdict in *Pennzoil v. Texaco* and his criticism of punitive damages in products liability cases). Indeed, Justice Neely has warned of the economic harm of punitive damages in products liability cases, R. Neely, *The Product Liability Mess* 2 (1988), and has relied on the views of counsel for one of TXO's *amici* in his punitive damages decisions. *See Garnes*, 413 S.E.2d at 906-07. Prior to *Haslip*, Justice Neely had expressed concerns, as did many in the tort reform movement, that individual States lacked sufficient incentive to restrain damages awards. Justice Neely hailed *Haslip* as a "major step" in eliminating that problem, *Garnes*, 413 S.E.2d at 905, and in *Garnes* he enforced and indeed extended *Haslip*'s requirements.

carelessness," *id.* at 36a, it might enjoy — in addition to the procedural protections of *Garnes* — a substantive ceiling on its punitive damages exposure of five times the compensatory award. *Id.* at 38a. But in this case the court found that the acts were intentionally harmful, and so should not be governed by an automatic ceiling, but rather should lead to an award of the amount "required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct." *Id.* at 39a.

SUMMARY OF ARGUMENT

I. The award here satisfies substantive due process. In *Haslip*, this Court affirmed a punitive damages award more than 200 times the plaintiff's out-of-pocket expenses and an unknown multiple of the compensatory damages awarded. 111 S. Ct. 1037 n.2. Expressly disavowing the notion that there is some "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *id.* at 1043, this Court instead approved a number of factors "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution." *Id.* at 1045. The award here easily passes muster under those factors: TXO's conduct was intended to inflict enormous harm, not only to respondents but also to other victims of TXO's "pattern of fraud, trickery, and deceit," Pet. App. 40a, and to society generally, which is threatened by such brazen attempts to undermine property and contract rights. TXO was a thoroughly reprehensible repeat offender whose highest officials authorized a deliberate and concealed scheme of land fraud and extortion. TXO's expected gain was as much as $8.3 million and warranted a correspondingly large award. Finally, the damages were entirely reasonable in light of TXO's financial position.

Because the award here is rationally related to the State's interests in deterrence and retribution, it cannot be called into question by the *ad hoc* "objective indicia" proposed by TXO. Moreover, TXO's "indicia" have no historical or constitutional basis. Punitive damages have traditionally borne "disproportionate" ratios to compensatory damages; indeed, one of their historical *raisons d'etre* is to provide a needed additional penalty *precisely where* compensatory damages are low but the potential for harm was

great. The award here was imposed by a jury and approved by West Virginia's courts, in accord with the allocation of authority established by the State constitution. To insinuate that such an award is presumptively "suspect," as TXO does, both denigrates the principles of federalism and disregards the historical role of the jury system.

II. Nor did the award here violate procedural due process. Almost all of TXO's arguments were not properly preserved, and in any event TXO's position rests on a caricature of the proceedings below. In truth, TXO received the benefit of *more* procedural protection than did the defendant in *Haslip* and more than TXO requested: extensive jury instructions proposed by *Alliance* rather than *TXO* that went far beyond the Alabama charge approved in *Haslip*; effectively "bifurcated" trial proceedings (Pet. Br. 3); post-trial review for excessiveness by a trial court that applied no lesser a standard than do Alabama judges; and appellate review by a court with a well-demonstrated proclivity for cutting damage awards that applied a more searching review than the Alabama Supreme Court. Indeed, even some of TXO's own *amici* acknowledge that TXO received its full entitlement under *Haslip*. Finally, TXO's "void-for-vagueness" argument has no merit and was squarely rejected by this Court in *Haslip*.

ARGUMENT

I. THE AWARD DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment requires punitive damages awards to be rationally related to a legitimate state interest — i.e., to be based on "plausible policy reason[s]" and not to have such an "attenuated" relationship to state interests as to be "arbitrary or irrational." *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992); *Burlington Northern R.R. Co. v. Ford*, 112 S. Ct. 2184, 2187 (1992). TXO flirts with various fuzzy and undefined variations on this theme, *see* Pet. Br. 12 ("rigorous" review); *id.* at 14 ("meaningful," presumably as opposed to "meaningless," review), and unabashedly relies on several *Lochner*-era precedents, Pet. Br.

12, that do not support its case[14] and that in any event have not provided the basis for *any* decision by this Court since the sea change exemplified by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In the end, however, TXO concedes that rational-basis scrutiny is the appropriate standard. *See* Pet. Br. 32. The award here easily meets that test.

A. The Award is Rational Under the Factors Outlined in *Haslip*

In *Haslip*, this Court approved a number of factors "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution," including:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 1045; see also the conclusions of law and economics scholars

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[14] *See Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 349-50 (1913) ($500 fine threatened to "intimidate" common carriers from "resorting to the courts to test the validity" of statutory maximum rates, since the only way to challenge the rate was to exceed it and face the consequences); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 489 (1915) (fine imposed with no notice that underlying conduct was unlawful); *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (penalty 113 times plaintiff's actual loss *permissible* because it need not be "confined or proportioned to . . . loss for damages").

in the Brief of West Virginia Trial Lawyers Ass'n as *Amicus Curiae* ("WVTLA Br."). Each of these factors supports the punitive damages award in this case.

1. The harm "likely to result" as well as actual harm

TXO tried to misappropriate between $5 million and $8.3 million in royalties from Alliance. Its assertion that the potential harm was slight because its misconduct "in no way decreased the value of respondents' property interest" (Pet. Br. 17) is a *non sequitur*; the slander of title was not an end in itself but simply the particular instrument employed to capture a highly profitable stream of royalties. The West Virginia Supreme Court found that TXO's illicit goal was relevant to the assessment of punitive damages, even if the tool it selected — slander of title — proved inadequate and thus turned out to cause respondents only $19,000 in harm. Moreover, the state court found that the extortion in this case "was not an isolated incident . . . but rather part of a *pattern and practice by TXO* to defraud and coerce those in positions of unequal bargaining power *vis a vis* TXO's superior legal firepower." Pet. App. 20a (emphasis added). *See* pp. 12-14, *supra*. The state supreme court specifically found that "an award of this magnitude [$10 million] is *necessary* to discourage TXO from continuing its pattern of fraud, trickery, and deceit," because "[t]he type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims." Pet. App. 40a (first emphasis added).

Not only did TXO's pattern of conduct threaten millions of dollars in loss to defrauded victims, but its chronic repudiation of contractual exchange and its willful attempts to undermine the property rights of others also injured the very market system on which commercial intercourse depends. *See* States' Br.; WVTLA Br. Indeed, the record in this case demonstrates that fraudulent quitclaim deeds of the kind used by TXO have been a particular source of concern in West Virginia. *See* p. 6, *supra*. Although it would of course be impossible to document a precise drop in economic production or in oil and gas drilling as a result of TXO's misconduct, States need not stand idly by as contract and property rights are subtly undermined until quantifiably widespread harm befalls their entire economies.

Drawing on the insights of Professor Clarence Morris,[15] the West Virginia Supreme Court rationally determined that behavior posing a danger of millions of dollars in harm warrants a commensurate award of punitive damages. *See Garnes*, 413 S.E.2d at 901-02. Justice Neely, who wrote the opinion below, explained in *Garnes* that, although "generally . . . punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm," there is a "very narrow exception" to the "general rule" where "the actual harm was minimal but the potential harm was tremendous" and a jury "may reasonably find punitive damages commensurate with the potential harm." *Id.* at 908 & n.7; *see also* Pet. App. 39a. Even in such an instance, there is an "'understandable relationship,'" *Garnes*, 413 S.E.2d at 908 n.7 (quoting *Haslip*, 111 S. Ct. at 1045), between punitive and actual damages: the former must be high when the latter are low but there was great risk of harm. "For example, a gunman who attempts to rob a bank but fails and is captured may do little actual damage, but we certainly want to deter future gunmen. That is why the penalty in this state for attempted aggravated robbery is the same as for successful aggravated robbery." 413 S.E.2d at 908 n.7.[16]

2. *The degree of reprehensibility*

The West Virginia Supreme Court also explained how the award was amply justified on grounds of retribution, and TXO's assertion

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[15] *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181 (1931) ("[T]he probable result is the measure of the 'seriousness' of [the defendant's] wrong. The actual result may have no bearing on this question. For example, the grossly negligent hunter may shoot into a crowd of people and only break a ten-dollar pair of eye glasses. The admonition meted out to him should be the same as though he had killed or injured someone. . . . In other words, it is the known tendency of acts which makes it desirable to prevent them, regardless of the particular results of any one commission.").

[16] The analogy to attempts in criminal law is a useful one; it is a subset of the general case in which the actual harm of a defendant's conduct is less than its potential for harm. For discussions of the deterrence-based rationales for punishing attempts, *see* WVTLA Br.; H.L.A. Hart, *Punishment and Responsibility* 129 (1968); R. Posner, *Economic Analysis of Law* 233 (4th ed. 1992); Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Leg. Stud. 435, 436-37 (1990).

that the court's reasoning was "circular" (Pet. Br. 22) is based on quite selective quotation.[17] The "enormity of [TXO's] offence," *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), does not disappear simply because Alliance courageously resisted it, any more than a bank robber foiled by the bravery of a teller is somehow less culpable than one whose victims do not sound the alarm. Indeed, many would say that TXO is as morally blameworthy as a similarly situated intentional tortfeasor whose scheme succeeded.[18] Respondents need not go this far in order to establish that no judicially cognizable application of what TXO calls the principles of "just desert" and "proportionality" (Pet. 24-26) could possibly forbid the imposition of a $10 million punishment on a proven repeat offender: (a) who wrongfully tried to extort as much as $8.3 million; (b) who undermined the systems of contractual exchange and property rights that make possible oil, gas, and coal production in West Virginia; and (c) whose pattern of wrongdoing

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[17] TXO asserts that, "[w]ith respect to reprehensibility, . . . the West Virginia court offered only its observation that 'the jury's verdict says more than we can say in an opinion twice this length,'" and TXO maintains that the court's analysis was simply that "the size of the verdict justifies the size of the verdict." Pet. Br. 22. But TXO omits *the previous part of the sentence in the state court's opinion*: "As for the reprehensibility of TXO's conduct, we can say no more than we have already said," Pet. App. 40a: *i.e.*, that TXO had engaged in deliberate wrongdoing concealed for months; that its fraud and extortion were "not an isolated incident but part of a pattern and practice by TXO to defraud and coerce" those vulnerable to its "superior legal firepower," *id.* at 20a; and that the misconduct here was part of TXO's pattern of "deception and chiseling." *Id.* at 26a. The court's reference to the jury's verdict was simply a rhetorical flourish indicating that the court understood that the jury had reached the same conclusion, not a sign that the court was relying on the size of the verdict as proof of reprehensibility.

[18] *See* H.L.A. Hart *Punishment and Responsibility* 129-31, 258 (1968); H. Gross, *A Theory of Criminal Justice* 433 (1979); Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Legal Stud. 435, 458 (1990); W. LaFave & A. Scott, *Criminal Law* 524 (2d ed. 1988) (noting range of penalties for attempt, "in some instances the same or even . . . higher" than penalties for successful offense); *cf.* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 58 (1982) ("The actual harm that occurred is at best a crude measurement of the moral egregiousness of a defendant's conduct . . . . [O]ne would not expect to find any correlation between egregiousness and the gravity of the injury sustained by the individual plaintiff.")

threatened "millions of dollars in damages to other victims." Pet. App. 40a. The award is certainly not "grossly out of proportion to the *possible* actual damages" of TXO's conduct. *Missouri Pacific*, 230 U.S. at 351 (emphasis added); *see also St. Louis, I. Mt. & So. Ry.*, 251 U.S. at 67; *cf. Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-99 (1991) (opinion of Scalia, J.); *id.* at 2705 (opinion of Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2716 (White, J., dissenting). Any federal effort to second-guess the judgment of the West Virginia judicial system would necessarily be the sort of impressionistic, subjective decisionmaking that the Due Process Clause forbids and that would have far-reaching constitutional implications.[19]

TXO's argument rests on sleight of hand: it unjustifiably equates the gravity of the offense with "the wrong inflicted." Pet. Br. 26. But TXO assuredly *did* injure the system of contract and property rights in West Virginia. *See* WVTLA Br. And, as demonstrated by the 27 *Amici* States, a wrongful act with great potential for social harm can be punished — and punished harshly — regardless of whether in a particular case it does little or no injury. That is of course especially true where a wrongdoer does not abandon its attempt but completes it, and ends up doing little harm to its chosen victim only because of that victim's fortitude. Any other rule would cast existing state criminal sentencing schemes into constitutional doubt. *See* States' Br. Thus, TXO's argument entirely collapses once one corrects its faulty premise that it should be punished solely on the basis of Alliance's $19,000 in compensatory recovery.

3. TXO's expected gain

It is hardly irrational to say that TXO's vast expected profit is relevant to its punishment, even though Alliance did not knuckle under to the extortion. TXO need not be treated as if it intended to fail, causing Alliance only $19,000 in losses — any more than TXO

[19] An untethered "just desert" review would have severe implications for the civil forfeiture statute at issue in *Austin v. United States*, No. 92-6073 (*cert.* granted, Jan. 15, 1993), which governs wrongdoers themselves, not simply "innocent owners." *United States v. A Parcel of Land*, No. 91-781, 1993 U.S. Lexis 1782, *14 (Feb. 24, 1993) (plurality opinion) (noting long history of forfeiture laws).

would have been entitled to escape punishment had it succeeded in stealing the land, only to find that it in fact did not contain economically recoverable natural gas, or any more than a thief who purloins an expensive watch but is apprehended before he can "fence" it must be treated as if he had no expected gain. Indeed, many authorities, including TXO's own *amici*, explain that "courts may evaluate the jury's award for excessiveness using the amount of a defendant's actual *or anticipated gain from his misdeeds*."[20] Punishment on the basis of expected gain is especially necessary where a defendant tries to take a "thin-market" asset with no standard price quotation, like an interest in oil and gas production, rather than an asset in a "thick" market, such as an individual share of publicly traded stock.[21]

TXO concedes that its expected gain must be adjusted upward by the *ex ante* probability that it would have escaped detection and punishment. Pet. Br. 28-29; *see also* Insurers' Br. at 16. TXO, however, is incorrect in equating this probability with the ease of concealment. Pet. Br. 29. To the contrary, underenforcement was likely here for several reasons: (1) TXO no doubt expected the smaller Alliance simply to buckle in August 1985 under the weight of the phony quitclaim deed and TXO's extortionate threats; (2) TXO's declaratory judgment action, though frivolous, might well have succeeded if TXO had been able to obtain the false testimony

[20] Brief *Amici Curiae* for The American Council of Life Insurance, et al. ("Insurers' Br.") at 6 (emphasis added); *id.* at 15-16 ("the expected profits where the defendant fails to profit as expected"); *see also* Brief of the American Tort Reform Association, et al., as *Amici Curiae*, at 3, 12, 16 ("the *anticipated* or actual gain to the defendant"; "the actual or *potential gain* to the defendant"; "the greater the *anticipated gain* from a tort, the greater the penalty needed to provide appropriate disincentives for its commission"); *Cummings Medical Corp. v. Occupational Medical Corp. of Am., Inc.*, 13 Cal. Rptr. 585, 590 (Cal. App. 2 Dist. 1992); R. Posner, *Economic Analysis of Law* 209-10, 220 (4th ed. 1992); W. Landes & R. Posner, *The Economic Structure of Tort Law* 160-61 (1987); Landes & Posner, *An Economic Theory of Intentional Torts*, 1 Int'l Rev. L. & Econ. 127, 135 (1981).

[21] *See* WVTLA Br.; Haddock, McChesney, & Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1, 18-19 & n.54, 29-30 (1990); Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 307-08 (1991); McChesney, *Deception, Trademark Infringement, and the Lanham Act: A Property-Rights Reconciliation*, 78 Va. L. Rev. 49, 54 (1992).

that it sought, *see* p. 8, *supra*; (3) even after TXO's suit was dismissed, respondents faced daunting barriers in proving malice and overcoming TXO's advice-of-counsel defense; and (4) TXO's deceit continued even into the trial. *See* pp. 11-12, *supra*. While the probability that TXO would have escaped punishment is difficult to quantify, it was from an *ex ante* perspective clearly significant (or else TXO would not have invested so much time and effort in the scheme), and a substantial upward adjustment in the damage award was amply warranted.[22]

4. TXO's financial position

TXO cannot dispute the reasonableness of the award in light of its wealth: the award amounts to less than 0.4 percent of Texas Oil & Gas Corp.'s net worth (between $2.0 and $2.5 billion, Tr. 354). Tr. 354. "[R]esearch reveals that a typical ratio for a punitive damages award to a defendant's net worth may be around one percent." *Cash v. Beltmann North Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990). Although at trial TXO objected to the evidence regarding wealth, it was properly admitted, *see* pp. 39-40, *infra*, and TXO introduced no contrary evidence on the topic at any stage of this case. TXO's sole substantive due process argument with respect to wealth is that the Fourteenth Amendment should be re-interpreted to require that a defendant's wealth not be considered at all in assessing the reasonableness of punitive damages. Pet. Br. 23, 27 n.25, 30 n.30. We refute this claim at pp. 36-39, *infra*.

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[22] TXO's claim that the award is so disproportionate that it will "overdeter" lawful conduct is veiled *Lochnerism*, not "narrow means-end testing" (Pet. Br. 28 n.27), since the West Virginia courts have rationally upheld this award as *necessary* for deterrence and not excessive and because "society has an interest in deterring and punishing *all* intentional wrongdoing." *Smith v. Wade*, 461 U.S. 30, 54 (1983) (emphasis in original). TXO's assertion that "the decision below expressly recognized the problem of overdeterrence" (Pet. Br. 28 n.26) relies on an out-of-context quotation in which the state court explained that the *substantive elements* of the slander-of-title tort already address the risk of overdeterrence. There are strong reasons to believe that the risk of overdeterrence is quite low in the case of intentional torts, *see* WVTLA Br., and where to strike the balance is in any event a matter for West Virginia to decide.

5. The remaining Haslip *factors*

TXO does not contend that the award is excessive under the other factors mentioned in *Haslip*.

* * *

In sum, the award in this case is fully commensurate with the potential for social harm and TXO's expected gain. By TXO's own accounting, it risked an upward adjustment by a factor of somewhere between 2 and 10 to account for the likelihood of underenforcement. Pet. Br. 30 n.31. The 526:1 ratio between the punitive damages and the $19,000 in attorney's fees necessary to defeat TXO's scheme is of no constitutional significance.[23]

B. A Punitive Damages Award That is Rationally Related to Deterrence and Punishment Is Not Unconstitutional Simply Because It Is Large or Because It Bears a High Numerical Ratio to a Plaintiff's Out-of-Pocket Loss

The punitive award in this case was necessary to deter wrongdoing by TXO and by others, was appropriate retribution, and otherwise meets the criteria outlined in *Haslip*. That should end the matter with respect to substantive due process. Indeed, such a conclusion is compelled by the very "means-end" testing that TXO champions, Pet. Br. 28 n.27, 31-33: if the award is a rational means to the State's end, it does not violate due process — *Q.E.D.* Accordingly, no reported decision of any tribunal — even in the days of *Lochner* — has ever invalidated as "excessive" a punitive damages award found necessary to deter wrongdoing and to serve as appropriate retribution.

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[23] *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182 (1931); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991); *Southern Life & Health Ins. Co. v. Turner*, 586 So.2d 854, 858 (Ala. 1991); *Hospital Auth. v. Jones*, 409 S.E.2d 501, 502-03 (Ga. 1991), *cert. denied*, 112 S. Ct. 1175 (1992). Even opponents of punitive damages agree that a ratio rule would be inappropriate. *See* Brief of Arthur Andersen & Co., et al., as *Amici Curiae* in Support of Petitioner, at 13.

1. Historically, punitive damages have often been far in excess of a plaintiff's compensable loss

As an historical matter, punitive damages arose in cases where a plaintiff had suffered little compensable loss, but the need for deterrence and punishment dictated an additional award — producing precisely the sort of lopsided ratios between punitive and compensatory damages that TXO finds so disturbing. Thus, while at common law there was an "understandable" relationship between punitive and compensatory awards, *Haslip*, 111 S. Ct. at 1045, there was no mathematical one. "[T]he practice of awarding damages *far in excess of actual compensation* for quantifiable injuries was well recognized" in the eighteenth century. *Browning-Ferris Indus. v. Kelco, Inc.*, 492 U.S. 257, 274 (1989) (emphasis added).[24] In perhaps the earliest punitive damages case in the

[24] For example, in *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), the victim of an illegal search requested "large and exemplary damages" on the ground "that trifling damages would put no stop at all to such proceedings," *id.* at 490, and received £1,000 after Lord Chief Justice Pratt explained to the jurors that they "have it within their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter any from proceeding in the future, and as a proof of the detestation of the jury to the action itself." *Id.* at 498-99 (emphasis added). In *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), the court approved an award of exemplary damages of £300 to a journeyman printer falsely imprisoned for six hours by an official who "used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damages." *Id.* at 768. In *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814), the court asked, "[I]n a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" The court rejected the notion that "the jury are not justified in giving more than the absolute pecuniary damage that the Plaintiff may sustain." *Id.* at 761. *See also Sears v. Lyons*, 171 Eng. Rep. 658 (K.B. 1818) (property damage); *Hewlett v. Cruchley*, 128 Eng. Rep. 696, 697 (K.B. 1813) (£2,000 verdict for malicious prosecution where out-of-pocket costs were £100); *Bruce v. Rawlins*, 95 Eng. Rep. 934, 934 (C.P. 1770) (£100 for illegal search that "did little or no damage"); *Benson v. Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (£150 for whipping, even though the plaintiff was "not hurt much indeed"); *Tullidge v. Wade*, 95 Eng. Rep. 909, 909 (C.P. 1769) (although plaintiff's loss was no more than twenty shillings, verdict of £50 upheld, and "[i]f the jury had given £100 damages, [the judge] should not have thought them too much").

A prominent early justification for punitive damages was their role in deterring acts that carried great potential for social harm, even though the

United States, the jury was instructed "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in the future." *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (1791). In language squarely applicable here, another court explained that "the damages should be in proportion to the degree of malice, and should not be restricted to a mere compensation for the injury actually done, however short it may be of the injury *intended*," and a defendant should not "be protected from exemplary damages, because the plaintiff's high character made the assault harmless." *Gilreath v. Allen*, 32 N.C. 67, 70 (1849) (emphasis in original). The pattern continued up to the framing of the Fourteenth Amendment in 1868 and afterwards.[25]

particular plaintiff had himself suffered little injury. For example, Coke argued that libel against a private person "deserves a severe *punishment*" because it "incites . . . quarrels and breach of the peace." *de Libellis Famosis*, 5 Co. Rep. f.125a (1607); *see also* 5 W. Holdsworth, *History of English Law* 211-12 (1924); *Grey v. Grant*, 95 Eng. Rep. 794, 795 (C.P. 1764) ("when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages" of £200 for a battery that caused no injury in the case at bar).

[25] *See New Orleans, J., & Great N.R. v. Hurst*, 36 Miss. 660, 667 (1859) ($4,500 where plaintiff suffered no out-of-pocket loss); *Reed v. Davis*, 4 Pick. 216, 217 (Ma. 1826) ($500 where "little or no damage done"); T. Sedgwick, *Measure of Damages* 531 (4th ed. 1868) (reporting case of $3,000 punitive for actual loss of $20); *Edwards v. Beach*, 3 Day 447, 450 (Conn. 1809) (amount of injury to property "is not the only ground of damages"; were it so, "a person so disposed might forcibly dispossess another of article of property at his pleasure, and compel the owner . . . to accept of the value in its stead"); *Dorsey v. Manlove*, 14 Cal. 553, 556 (1860); *Clark v. Bales*, 15 Ark. 452, 459 (1855); *Treat v. Barber*, 7 Conn. 274, 279 (1828); *Linsley v. Bushnell*, 15 Conn. 225, 236 (1842); *McNamara v. King*, 2 Gilm. Ill. R. 432, 436 (1845); *Whipple v. Walpole*, 10 N.H. 130, 132-33 (1830); *Taylor v. Grand Trunk R.*, 48 N.H. 304, 318-19 (1869); *Lynd v. Pickett*, 7 Minn. 184, 200-01 (1862); *McWilliams v. Bragg*, 3 Wis. 424, 426-29 (1854); *Parsons v. Harper*, 57 Va. 64, 78 (1860); *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 294 (1892). Punitive damages were also employed to "discourage [the] repetition" of acts with large potential for social harm, irrespective of whether the potential was realized in the individual case. *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 460-61 (1877); *see also Whipple*, 10 N.H. at 132-33.

Whatever the interests that society has deemed to be important objects of legal protection,[26] punitive damages have often borne dramatic ratios to their compensatory counterparts. If there is a "proportionality principle" to be extracted from the common law, it is that punitive damages need not be "proportional" to out-of-pocket loss, but rather "proportional" to the amount necessary to deter the defendant and to serve as appropriate punishment. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 19 (1982).

2. TXO's proposed "indicia" do not render the award suspect

Incredibly, TXO simply shunts aside the factors approved in *Haslip* "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution," 111 S. Ct. at 1045, and proposes its own supposedly "objective indicia," Pet. Br. 16, whose chief appeal and theoretical foundation seems to be TXO's fervent hope that it can show that the award in this case does not meet them. But for over two centuries common-law courts have imposed punitive damages where necessary with barely any *mention*, let alone *application*, of TXO's "indicia." Moreover, the proposed criteria make no constitutional sense because they are crude and arbitrary measures disconnected from the *purposes* of punitive damages. They contradict TXO's *own* claim that justice requires punishment to be tailored to the individual facts and circumstances of the offense (Pet. Br. 24-27), rather than to wooden rules such as awards against *different* defendants in *different* locales under *different* circumstances. None of the indicia can properly be used to call into question the award in this case.

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[26] The issue is not whether the same types of injuries (to honor or reputation, for example) are at issue here as were at issue in eighteenth century English decisions; societies and causes of action change over time. "Although the precise nature and use of punitive damages may have evolved, . . . the concept of 'punitive damages' has a long pedigree in the law," *Molzaf v. United States*, 112 S. Ct. 711, 715 (1992), as does the principle that punitive damages may greatly exceed compensatories. In any event, punitive damages have long been available in cases involving fraud and injuries to property interests. *See, e.g.*, Auto Br. 10-13; G. Field, *Law of Damages* 67-68 (1876); 3 J. Sutherland, *Law of Damages* 471-72, 520, 593 (1883); *Whipple*, 10 N.H. at 131.

An award that rationally serves a State's interests, for example, cannot be said to violate due process simply because it happens to be larger than those typically awarded in that State — any more than an award that was *not* rationally related to any state interest would be constitutional merely because it was in line with past awards in that jurisdiction, or any more than the prior awards that TXO would use as its benchmarks were themselves unconstitutional because they were record-setting sums at the time of their decision. West Virginia's history records no prior punitive damages case involving a defendant like TXO. To say that the State's courts are disabled from imposing an appropriate award in this case because they have steadfastly resisted substantial awards in *other* cases is to penalize restraint and to send a dangerous signal to potential wrongdoers everywhere that punitive damages are capped by the pre-existing awards in a given jurisdiction.

TXO proposes an inter-jurisdictional comparison (Pet. Br. 16), but if its own *amici* are to be believed, punitive awards in other States have reached astronomical levels — indicating that such a comparison would validate rather than undermine the award here. TXO cites slander-of-title decisions, but the amount needed to deter slander regarding plots of ordinary land is obviously not the same as that necessary with respect to lucrative oil and gas tracts worth many millions. Moreover, the cases cited by TXO do not support its argument; they show that, based on the egregiousness of the wrongdoing, courts often uphold awards *far greater than* a defendant's expected gain.[27] In any event, TXO should be compared not simply to one-time title slanderers but to defendants with long histories of deceit and fraud who scheme to misappropriate millions of dollars; the *amicus* briefs on both sides confirm that such defendants are typically subject to even greater punishments than the award meted out in this case. Indeed, the

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[27] *See Soneff v. Harlan*, 712 P.2d 1084, 1086-88 (Colo. Ct. App. 1985) (unsuccessful attempt to evade purchase and sale agreement and seize control of building worth $80,000 punished by award of $800,000); *Johnston v. Doran*, 540 P.2d 306, 307, 309, 311-12 (Mont. 1975) (attempt by real estate broker to "move in" on another broker's clients and defraud them punished with award more than 3 times expected gain of $14,000); *Summa Corp. v. Greenspun*, 655 P.2d 513, 517 (Nev. 1983) (failed effort to harm newspaper owner punished with $1 million award, even though defendant had no expected pecuniary gain).

West Virginia Supreme Court compared the award in this case to all post-*Haslip* decisions, Pet. App. 35a, and found that it was not excessive.

Moreover, TXO's approach ignores the special needs of different States, such as West Virginia's historic concern with fraudulent quitclaim deeds and its strong interest in ensuring the orderly exploitation of its natural resources. There is no warrant in the Due Process Clause for specifying by judicial fiat the weight that an individual State must give to such factors, and it should be underscored that the 27 *Amici* States staunchly oppose TXO's proposed inter-jurisdictional comparison test as a basic affront to federalism. This Court has already recognized the constitutional flaws in TXO's proposed test.[28]

Finally, there is no basis for calling the award into question on the ground that West Virginia statutes provide for treble damages for waste and carrying away trees from another's land, Pet. Br. 19 n.17 (as if TXO's multi-million-dollar scheme could be compared to those acts), and imposes relatively low criminal fines for larceny, theft, and fraud. In this case, TXO has been assessed no more (and almost certainly less) than three times its expected gain or potential harm. But that is not the real point. Imprisonment is not an available punishment in a civil case, and a much higher monetary sanction is required to deter. *See Haslip*, 111 S. Ct. at 1046. Because the States rely on punitive damages to encourage the private enforcement of the laws, their legislatures are able to reduce public enforcement or maintain low criminal penalties precisely because of the deterrent effects of punitive damages. TXO concedes that there

[28] *See Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-99 (1991) (opinion of Scalia, J.); *id.* at 2704, 2707 (Kennedy, J., concurring in part and concurring in the judgment); *Rummel v. Estelle*, 445 U.S. 263, 281-82 (1980). Moreover, in criminal law cases like *Harmelin* and *Solem v. Helm*, 463 U.S. 277 (1983), it is usually possible to determine with some precision the sentence a defendant would have received in other jurisdictions. But a jury imposing punitive damages must make an essentially *qualitative* assessment based on all the facts and circumstances of a particular case — a process that quite naturally and properly leads to "disparate outcomes," *Haslip*, 111 S. Ct. at 1055 (Kennedy, J.), and more particularly makes it impossible to say *what* penalty the defendant would have received in a different jurisdiction. That a jury in a certain State assessed a particular sum in a different slander of title case says nothing about whether TXO would have been assessed $10 million, or more, or less, if its case had been tried in that jurisdiction.

is no statutory limit on punitive damages in slander of title cases applicable here. As the 27 *Amici* States stress, this Court should respect state-established allocations of authority between legislative and judicial branches. It should not, in the name of the West Virginia legislature, impose a restriction on the State's judicial system that the West Virginia legislature has not itself imposed.

3. *An award is not suspect simply because it is imposed by a State through its judicial system rather than through its legislature*

An otherwise rational award is not suspect merely because it is imposed by a court. As Dean Griswold concedes, "[e]ven in the absence of legislative guidance, punitive damages awards that bear a rational relationship to the purposes of deterrence and punishment may not be so excessive and arbitrary as to deprive a defendant of due process of law." Insurers' Br. at 14; *see also Haslip*, 111 S. Ct. at 1046; *St. Louis, I. Mt. & So. Ry.*, 251 U.S. at 67. Even TXO does not specify the precise increase in scrutiny that it believes is appropriate in cases involving jury awards.

The States have a strong interest in relying on jury-imposed punitive damages awards to enforce state laws. *See* States' Br. TXO's assertion that its punishment was "meted out by a single jury," Pet. Br. 14, is simply false. The award here was imposed by the State's *judicial system* after review by two state courts, in accord with the allocation of authority established by the state constitution. TXO cannot dismiss that arrangement so lightly,[29] and its complaint that its award was not approved by "the elected representatives of the States' citizens," *id.* at 13, rings hollow since

[29] To treat the jury system as suspect ignores the role of the constitution in establishing it, W. Va. Const. Art. III, § 14, of the people in ratifying the arrangement, and of the ability of the executive and legislature to limit jury awards. More importantly, it intrudes on the constitutionally protected authority of the States to govern themselves and to "structur[e] their governments" free from federal interference. *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 832 (1992); *see New York v. United States*, 112 S. Ct. 2408, 2418, 2421, 2432-33 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991); *cf. Growe v. Emison*, No. 91-1420 (Feb. 23, 1993) (federal courts must defer to state apportionment procedures, whether undertaken by state courts or state legislatures).

the Justices of West Virginia's highest court *are in fact elected*.

This Court has often noted the critical governmental role played by the jury in administering justice in individual cases. *See, e.g., Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991). Indeed, tailoring punishment to the facts and circumstances of a given case is not a process that works to the inherent disadvantage of defendants; if the West Virginia legislature had provided that punitive damages should be set categorically at three times the defendant's expected gain, would TXO now be arguing that its $24.9 million punitive damage verdict was a violation of due process for lack of individualized determination? TXO's demand for strict review of jury awards, like the premise of its procedural due process and void-for-vagueness arguments that a jury must be severely constrained by certain unspecified standards, is utterly irreconcilable with its plea to judge the award by the standards of history, for setting the proper damages "has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Day v. Woodworth*, 54 U.S. at 371.[30] TXO's argument would

[30] *See Townsend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677) (court "could neither lessen the sum [of damages] nor grant a new trial, . . . since by the law the jury are judges of the damages"); *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764) ("in cases of tort the jury are the only proper judges of the damages" and explaining that new trials were granted only in cases of jury misbehavior); *Duberley v. Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1780); *Fabrigas v. Mostyn*, 96 Eng. Rep. 549, 549 (C.P. 1774); *Hewlett v. Cruchley*, 128 Eng. Rep. 696, 698 (K.B. 1813).

See also Missouri Pacific R.R. Co. v. Humes, 115 U.S. 512, 521 (1885); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886); *Minneapolis & St. Louis R.R. Co. v. Beckwith*, 129 U.S. 26, 36 (1889); *Dorsey v. Manlove*, 14 Cal. 553, 556 (1860) (in punitive damages cases, "the measure and amount of the damages are matters for the jury alone"); *Sheik v. Hobson*, 64 Iowa 146, 148 (1884) ("the question whether punitory damages shall be assessed, and the amount of the assessment, is left to the discretion of the jury"); *McNamara v. King*, 2 Gilm. Ill. R. 432, 436 (1845); *Schlencker v. Risley*, 4 Ill. 483, 487 (1842); *Taylor v. Giger*, 3 Ky. 586, 587 (1808); *North v. Cates*, 5 Ky. 591, 593 (1812); *New Orleans, J., & Great N.R. v. Hurst*, 36 Miss. 660, 666-67 (1859); *Vunck v. Hull*, 3 N.J.L. 814, 816 (1809); Field, *supra*, at 65; Sedgwick, *supra*, at 537-38 n.1; 1 Sutherland, *supra*, at 742; 3 Sutherland, *supra*, at 661; Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L. Rev. 859, 899-900 (1991).

undermine the traditional role of the jury in many areas of the law and should therefore be rejected.[31]

II. THE AWARD DOES NOT VIOLATE PROCEDURAL DUE PROCESS

TXO's procedural due process objections are completely misplaced. In truth, TXO received *more* process than it requested and more than *Haslip* directs — as its own *amici* candidly admit. *See* Brief of Continental Cas. Co. at 5; Brief of CBS, Inc. at 17, 19. Moreover, *Haslip* did not incorporate into the Fourteenth Amendment the particular details of Alabama's system for awarding punitive damages. It merely upheld a state scheme that, *as a totality*, imposed "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." 111 S. Ct. at 1045; *see Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1386 (5th Cir. 1991). In the context of actions for civil penalties between private parties, this Court has steadfastly declined to use the Constitution to add specific new procedural devices to the traditional requirements of notice, a meaningful opportunity to be heard, and a neutral decisionmaker. *See Haslip*, 111 S. Ct. at 1046 n.11; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989); *United States v. Halper*, 490 U.S. 435, 450 (1989). TXO's formalistic objections provide no warrant for enacting "a rigid constitutional code of procedural necessities." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985).

[31] *See* States' Br; Brief of Consumers Union as *Amicus Curiae*. As this Court noted in *Haslip*, juries are routinely afforded much greater discretion "in many familiar areas of the law as, for example, deciding 'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish." 111 S. Ct. at 1044. Noneconomic awards for pain and suffering, for example, frequently run into the millions of dollars, yet "there is no clear method for measuring the loss and determining the amount of compensation due." *Samsel v. Wheeler Transp. Servs.*, 789 P.2d 541, 552 (Kan. 1990). "[T]he alleged due process objection to punitive damages once again calls into serious question other established rules of tort law." Riggs, *supra*, at 908.

A. The Jury Instructions Satisfied Due Process

1. TXO's claims are not properly presented

TXO's new-found objections to the jury charge were not presented below and are not properly included within the second question presented. TXO made no relevant objection at trial[32] and *did not raise either aspect of the jury instruction* in its arguments before the West Virginia Supreme Court. Accordingly, the decision below addresses *neither* instruction of which TXO now complains.[33] Indeed, TXO *specifically conceded* that "[i]t is clear under West Virginia law that the financial standing *of the defendant* is an element to be taken into consideration in determining the proper measure of punitive or exemplary damages," State Ct. Br. at 37 (emphasis in original), and certainly did not suggest that this rule was a violation of due process. This Court's "pressed or passed on" rule is not met. *Bankers Life*, 486 U.S. at 77.

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[32] At trial, TXO broadly objected to the mention of wealth in the jury instruction but made no reference to "due process," "the Fourteenth Amendment," or even the "federal Constitution." J.A. 34. Accordingly, TXO did not properly frame a federal claim. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Also at trial, TXO raised *no objection at all* to the instruction permitting the jury "to provide additional compensation for the conduct to which the injured parties have been subjected," J.A. 34, and in fact argued to the trial court that "it is clear under West Virginia law . . . that punitive damages can both serve a compensatory and a penalty function." TXO Post-Trial Br. at 42. TXO's objection is now barred by West Virginia law. *See Shia v. Chvasta*, 377 S.E.2d 644, 646 (W. Va. 1988).

[33] The decision below discusses *only* TXO's argument that the *admission of evidence* concerning the financial condition of TXO Production Corp. was in error as a matter of *state law* "under the fifth criterion from Syllabus Point 3" (Pet. App. 40a) of *Garnes* — not because wealth is a constitutionally impermissible criterion but because "[t]he [trial court supposedly] erred by allowing the jury to assess punitive damages based upon testimony as to the combined net worth of the 'TXO Division' of a remote parent corporation, comprised of 15 non-party companies, rather than upon the net worth of TXO Production Corporation." Brief of Appellant TXO before the West Virginia Supreme Court ("State Ct. Br.") at 8 (section entitled "[t]he assignments of error relied upon on appeal").

Nor are TXO's new-found objections properly contained in the second question presented to this Court.[34] Thus, even if respondents had not preserved the matter of TXO's waivers in their Opposition, they would be entitled to raise the issue now. In fact, however, respondents *did* preserve the waiver issue, by noting in the Opposition that, "*in spite of TXO's own failures to raise issues below*, it received all the protection of due process to which it is entitled." Opposition at 14 (emphasis added).

2. TXO was accorded more procedural protections by the jury instructions than Haslip *requires and more than TXO requested*

TXO concedes that "[t]he jury here was provided with more information than was the jury in *Haslip*." Pet. Br. 35. Indeed, the instructions here (J.A. 34-35) (1) required the jury to make an additional finding of malice; (2) required the jury to examine evidence favorable to TXO, by directing it to weigh "any mitigating circumstances which may operate to reduce the amount of the damages"; (3) instructed the jury to consider additional factors not enumerated in *Haslip*, including "the extent of the harm inflicted," "the intent of the party committing the act," and "all of the circumstances surrounding the particular occurrence"; and (4) avoided ambiguities in the *Haslip* instructions, such as the phrase "the character and degree of the wrong," as well as the troubling instruction (*see* 111 S. Ct. at 1057 (O'Connor, J., dissenting)) that punitive damages were "entirely discretionary with the jury." The instructions in the instant case were more than TXO requested and far surpass those upheld by other courts in the wake of *Haslip*.[35]

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[34] The petition itself discussed only the alleged deficiencies in the post-trial and appellate review, and made no mention of the jury instructions, admission of evidence, the wealth of the defendant, or the reference to a need for additional compensation.

[35] *Alliance* proposed this instruction at the close of the jury charge conference. For its part, TXO was content to have the jury assess punitive damages under an instruction that provided *no guidance at all*. J.A. 25. Indeed, TXO waived an opportunity proffered by the trial judge to instruct the jury that any punitive damages were required to be reasonably proportional to compensatory damages. J.A. 32-33. Those who choose not to avail themselves of procedural safeguards have no basis for complaining of a

The jury instructions, however, were not the only procedural protection that TXO received over and above *Haslip*'s requirements. Although TXO did not request a separate punitive damages proceeding pursuant to West Virginia Rule Civ. P. 42(c), its quiet title action and the counterclaim for slander of title were, in TXO's words, "bifurcated." Pet. Br. 3; *cf. Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). TXO would not have been liable for *any* damages, let alone punitive damages, if it had prevailed in a critical segment of the liability determination — the quiet title bench trial before Judge Stephens.[36]

3. *TXO's attacks on the jury instructions have no merit*

a. *The Fourteenth Amendment does not prohibit a State from permitting juries to consider a defendant's wealth in assessing punitive damages*

Like 36 other States, *see* attached Appendix, West Virginia has quite rationally determined that the jury may consider a defendant's wealth because of the declining marginal utility of money — the

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deprivation of due process. *E.g.*, *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 39 n.21 (1990). For less detailed instructions, see *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *Viking Ins. Co. v. Jester*, 836 S.W.2d 371, 379 (Ark. 1992); *K-Mart Corp. v. Pearson*, 818 S.W.2d 410, 417 (Tex. Civ. App. — Houston [1st Dist.] 1991); *General Motors Corp. v. Saenz*, 829 S.W.2d 230, 241 (Tex. Civ. App. — Corpus Christi 1991); *Burke v. Deere*, 780 F. Supp. 1225, 1239 (S.D. Iowa 1991); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991); *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir. 1991); *Medical Mut. Liab. Ins. Soc'y v. B. Dixon Evander & Assoc., Inc.*, 609 A.2d 353, 368 n.14 (Md. App. 1992); *Fraidin v. Weitzman*, 611 A.2d 1046, 1066 (Md. App. 1992).

[36] Moreover, Judge Stephens' decision that, "as a matter of law, . . . there is no ambiguity in the deed[s]" (J.A. 17) that established Tug Fork's title (and hence Alliance Resources' title) did not automatically render TXO liable for damages. Alliance *still* was required to prove all of the rigorous elements of slander of title, including notice. J.A. 23-24, 26. Even then, Alliance was required to overcome TXO's various affirmative defenses — which invited the jury to decide that, despite Judge Stephens' previous ruling that the deed was unambiguous as a matter of law, TXO subjectively believed otherwise, J.A. 25, 31 — *and* to establish all of the prerequisites for punitive damages. J.A. 34-35.

judgment that the disutility caused by the loss of $1 is less for a wealthy defendant than for a poor one[37] — and because a bigger award is needed to "attract the . . . attention" of a large corporation for reasons of organizational dynamics.[38] These policy judgments are well within a State's authority to make and indeed are fully consistent with: the Restatement (Second) of Torts § 908(2) & comment e (1977); decisions of the "vast majority of courts" to consider the matter, *Punitive Damages: Relationship to Defendant's Wealth*, 87 A.L.R.4th 141, 151 (1992); and the views of leading commentators. *See* W. Prosser, *Handbook of the Law of Torts* § 2, at 14 (4th ed. 1971); D. Dobbs, *Law of Remedies* § 3.9, at 218-19 (1973). In the Eighth Amendment context, Justice O'Connor, joined by Justice Stevens, has already rejected TXO's position, *see Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part), and the argument is no stronger when cloaked in the language of due process. Furthermore, TXO's position is, "as a historical matter, . . . weak indeed," *ibid.*, for juries have considered defendants' wealth for hundreds of years,[39]

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[37] *See* R. Posner, *Economic Analysis of Law* 227-28, 232 & n.3 (4th ed. 1992); A. Sen, *On Economic Inequality* 83-85 (1973); *Robertson Oil Co. v. Phillips Petroleum Co.*, 779 F. Supp. 994, 997 (W.D. Ark. 1991). Asked to compare the salaries of present-day baseball players with the relatively meager pay of his time, Mickey Mantle recently said, "You know what really makes me mad — they still fine these guys the same thing they fined us. Me and Billy [Martin] got fined $500. That was a lot of money [to us]. If I was making $5 million I'd say, 'Here, take another.'" *Larry King Live*, CNN, April 16, 1991.

[38] *See* Pet. App. 36a-38a, 39a; *see also Garnes*, 413 S.E.2d at 910; *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 78 (W. Va. 1986). This is a facet of the well-documented "agency" problem of corporate management, which exposes the flaw in TXO's assumption (Pet. Br. 27 n.25) that corporations are simply abstract conduits of dividends to shareholders. *See* Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership*, 3 J.Fin.Econ. 305 (1976); *Morrisey v. Curran*, 650 F.2d 1267, 1273 (2d Cir. 1981). The logic behind West Virginia's rule is akin to the justification for *respondeat superior* upheld in *Haslip*. *See* 111 S. Ct. at 1041.

[39] *See, e.g., Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C.P. 1780); *Bodwell v. Osgood*, 3 Pick. 379, 385 (Ma. 1825); *McNamara v. King*, 2 Gilm. Ill. R. 432, 436 (1845); *McAulay v. Birkhead*, 35 N.C. 28, 31-32 (1851); *New*

in accord with the views of such notables as Kant, *see The Metaphysical Elements of Justice* 101 (J. Ladd trans. 1965), and Blackstone, *see* 4 W. Blackstone, *Commentaries* *371. A few States have restricted (especially by procedural devices) the consideration of a defendant's wealth, in self-conscious efforts to go beyond what due process requires.[40] Pet. Br. 37. But this simply corroborates the statement by the 27 *Amici* States that there are important policy choices and different procedural options that militate against a rigid constitutional rule.

Nor is the particular instruction here suspect. *Haslip* did not of course invalidate the longstanding rule that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981). *Haslip* indicated merely that a scheme in which the factfinder was instructed to award damages *only* on the basis of a defendant's net worth would be questionable. *See* 111 S. Ct. at 1045. The jury instructions here did not suffer from that flaw; they directed the jury to consider wealth *as one factor among many* and to consider wealth not in the abstract but *only in the specific context of deterrence*: "the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary

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Orleans, J. & Great N. R. Co. v. Hurst, 36 Miss. 660, 669 (1859); *Belknap v. Boston & M.R. Co.*, 49 N.H. 358 (1870); *Meibus v. Dodge*, 38 Wis. 300, 311 (1875); *Cumberland Tel. & Tel. Co. v. Poston*, 30 S.W. 1040, 1041 (Tenn. 1895); *Aland v. Pyle*, 106 A. 349, 350 (Pa. 1919); 1 Sutherland, *supra*, at 745. TXO's *Amici* Owens-Illinois and Texaco claim that the admission of evidence regarding wealth has a "strange history" (*Amici* Br. 15 n.2) but the authority on which they rely, *Hilgedick v. Koehring Fin. Corp.*, 8 Cal. Rptr. 76, 101 (Ct. App.) (Peterson, J., concurring), *review granted*, 832 P.2d 899 (1992), refers only to the history of the practice *in California* and explains that an 1877 state decision relating to compensatory damages was extended almost a century ago to the context of punitive damages — creating a tradition extending from the Fourteenth Amendment's adoption to the present.

[40] *In re Paris Air Show*, 622 F.2d 1315 (9th Cir.) (Kennedy, J.) (upholding California's statutory restriction on punitive damages in wrongful death actions against equal protection challenge), *cert. denied*, 449 U.S. 976 (1980), cited by TXO for the proposition that wealth has prejudicial effects on a jury (Pet. Br. 36), in fact explains that not wealth but "[t]he *frequently violent and dramatic circumstances of accidents that lead to wrongful death actions*" might have those effects. *Id.* at 1323.

means under the same or similar circumstances." J.A. 35.[41]

Finally, TXO argues that the evidence admitted at trial was improper because it allegedly concerned the wealth of Texas Oil & Gas Corp. rather than of the supposedly separate TXO.[42] But, in the words of TXO vice president Michael Good, the two were "essentially the same operating entity." Tr. 648; *see also* Tr. 313 ("almost impossible . . . to establish any differentiation between the two entities"). Good, who headed the Charleston office of TXO, was also vice president of Texas Oil & Gas. Tr. 648. Duncan Wood testified that he "was employed by Texas Oil and Gas Corp."

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[41] TXO admits that the jury was given a host of factors besides wealth to consider, but insists that the jury was given "no numerical guide . . . as to any of these factors other than 'wealth.'" Pet. Br. 36 n.36. But the instructions gave the jury *no* "numerical guide" as to wealth and instead tied it closely to deterrence. If TXO's claim is that the jury likely attached too much weight to its wealth, because it is itself expressed as a number, then why would the jury not have attached equal weight to expected gain or to potential harm, which were also numbers, or to the out-of-pocket loss of $19,000? TXO's argument is utter conjecture.

TXO is flatly wrong in contending that the closing arguments suggested to the jury that it should base its punitive damages solely on TXO's wealth. To the contrary, counsel for Alliance stressed a deterrence rationale in their closing arguments. Pet. Br. App. 23a, 25a. Even when counsel mentioned TXO's wealth, they discussed it *only* in the context of deterrence. *E.g.*, *id.* at 22a ("When you think about fining this defendant, a corporation of this magnitude and this size, ladies and gentlemen, what would it take to keep them from doing this again?"). Moreover, the *closing arguments* could not have rendered suspect the *jury instructions*, which TXO conceded in the West Virginia Supreme Court were proper; TXO had an adequate state-law remedy for any allegedly prejudicial remarks in the closing; and TXO raised no objection to the closing arguments at trial, on appeal, or in its cert. petition.

[42] The jury was *not* instructed to consider the net worth of TXO's ultimate parent, USX Corp., nor was any such evidence introduced. An expert witness calculated the net worth of Texas Oil & Gas Corp. using annual reports and information from Value Line and Dow Jones News Service. Tr. 347, 351-52. He noted that TXO, not Texas Oil & Gas, sold one oil field a few weeks prior to trial for $159 million. Tr. 348. He explained four methods used by economists to value a company and used the most conservative method to value Texas Oil & Gas Corp. Tr. 350-54. His estimate did not include other companies within USX, such as Marathon Oil Co. Tr. 367-68. TXO offered no rebuttal evidence, even though it had "the best access" to such information. *Fenlon v. Brock*, 265 Cal. Rptr. 324, 328 (Cal. App. 4 Dist. 1989); *Morgan v. Woessner*, 975 F.2d 629, 641 (9th Cir. 1992).

and assigned to work for TXO. Tr. 560. On many important matters approval was required from Good's superior, a senior vice president of Texas Oil & Gas. Tr. 677. The April 2 assignment of lease from Alliance to TXO was "prepared by Texas Oil and Gas Corp." Tr. 474; Rec. 1628. The financial information of TXO and Texas Oil & Gas was consolidated. Tr. 651, Pet. App. 40a n.13, and TXO refused to disclose information relating to its finances. Pet. App. 40a-41a.[43] Thus, the evidence was properly admitted, and, in any event, the issue is not a federal constitutional one. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1992). The state supreme court noted in the alternative that, in general, the net worth of parent companies is rationally related to the State's interests in deterrence and punishment and would therefore be admissible.[44]

b. The Fourteenth Amendment does not prohibit a State from permitting juries to consider the need for additional compensation in assessing punitive damages

After taking precisely the opposite position in the trial court, *see* n. 32, *supra*, TXO now objects, for the first time in this case, to the instruction that the jury could award punitive damages "to provide additional compensation for the conduct to which the injured parties have been subjected." J.A. 34. This instruction could hardly violate due process; the provision of needed additional compensation was one of the earliest justifications for punitive damages and

[43] Alliance requested TXO's financial records via two separate sets of interrogatories and motions to produce. *E.g.*, Interrogatory No. 6 (requesting that TXO produce "income tax returns, financial statements, and Forms 10-K for the years 1980 through 1985 inclusive") (R.754-56). TXO replied that financial records, separate and distinct from Texas Oil & Gas Corp., did not exist. Tr. 340(a), 340-43.

[44] Pet. App. 41a-42a; *see also* n.38. Washington Legal Foundation argues that the ruling was erroneous as a matter of West Virginia law, but cites no case involving the consideration of corporate wealth in punitive damages, ~~*see* Brief *Amicus Curiae*~~ at 7-18; the argument is at any rate irrelevant, *see Estelle v. McGuire*, 112 S. Ct. at 480; *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874), and without force since its premise that judicial decisions arguably in tension are "void for vagueness" is simply wrong.

remains the practice in many States.[45] TXO's strained argument that the instruction could serve no state interest besides protectionism is belied by the fact that the rule governs all cases, regardless of the citizenship of the parties,[46] and by the explanation of the West Virginia courts that punitive damages provide additional compensation for the indeterminate damages caused by intentional egregious misconduct "[w]here the plaintiff's injury is incapable of precise measurement."[47] At any rate, TXO and Alliance Resources, the principal litigants in this case, are *both Texas* corporations.

B. The Post-Trial Review Satisfied Due Process

TXO mischaracterizes the issue of post-trial review in this case. In *Garnes*, the West Virginia Supreme Court (per Neely, J.), went *beyond Haslip* in affording procedural protections to defendants, *see* 413 S.E.2d at 908-10, and "set out a new system for the review of

[45] *See* C.T. McCormick, *Handbook Law of Damages* § 78, at 279 (1935); Brief *Amici Curiae* of Phillips Petroleum Co., et al., at 11; Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 Ala. L. Rev. 1079, 1085 (1989); *Continental Cas. Co. v. Fibreboard Corp.*, 762 F. Supp. 1368, 1376 (N.D. Cal. 1991); *Triangle Sheets Metal Works, Inc. v. Silver*, 222 A.2d 220, 225 (Conn. 1966); *Bourgeois v. State Farm Mut. Auto. Ins. Co.*, 562 So.2d 1177, 1179 (La. App. 4th Cir. 1990); *Creech v. Aetna Cas. & Sur. Co.*, 516 So.2d 1168, 1173 (La. App. 2d Cir. 1987), *writ denied*, 519 So.2d 128 (1988); *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980); *Transportation Ins. Co. v. Moriel*, 814 S.W.2d 144, 150 (Tex. Civ. App. — El Paso 1991); *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984).

[46] Tellingly, TXO has raised no claim under the Privileges and Immunities Clause of Art. IV, § 2, or any other provision, charging that it suffered discrimination in the West Virginia courts. Indeed, the home States of TXO, Marathon Oil, and USX — Texas, Ohio, and Pennsylvania, respectively — are all *amici* supporting *respondents* in this case.

[47] *Wells v. Smith*, 297 S.E.2d 872, 879 (W. Va. 1982); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227, 233 (W. Va. 1981); *cf. Harless v. First Nat'l Bank*, 289 S.E.2d 692, 702 (W. Va. 1982). TXO implies that the instruction afforded the jury too much discretion. But the charge limited punitive damages to the additional compensation *needed to remedy injuries caused by TXO*; it was at least as restrictive as an ordinary compensatory damages instruction. The jury was instructed not to speculate or guess with respect to compensation generally. J.A. 40.

punitive damages awards in West Virginia," *id.* at 908, including a series of factors for the trial judge to consider on post-trial review. *Id.* at 909. These factors surpass the Alabama post-trial review approved in *Haslip* (*see* Part II-B-1, *infra*), and will be applied in all future cases in West Virginia. In this case the trial judge — acting before *Haslip* and *Garnes* — did not have the benefit of this guidance. The West Virginia Supreme Court determined that, as a matter of state law, the trial had not complied with some of "the technical requirements set forth" in *Garnes*, applying those requirements retroactively "would unnecessarily send far too many cases back for retrial," Pet. App. 32a, and that such a course would be especially unwarranted here given TXO's procedural default. *See* p. 45, *infra*. Therefore, the state supreme court explained, it would rectify the matter by being "especially diligent in our review of punitive damages awards entered before *Garnes* was decided." Pet. App. 32a.

Whether this was a permissible way of dealing with a pre-*Haslip* trial was one of the questions on which TXO sought certiorari: "[w]hether TXO was denied due process by the West Virginia Supreme Court's refusal retroactively to apply its decision in *Garnes*." But *this Court did not grant certiorari on that question*. TXO's attempt to transform its rejected question into an issue of the adequacy of post-trial review ignores the reasoning of the West Virginia Supreme Court.

Even on its own terms, however, TXO's argument has no merit.

1. The trial court's post-trial review complied with Haslip

TXO is wrong in asserting that the trial court in this case "summarily denied" its post-trial motion. Pet. Br. 41. To the contrary, the court held a hearing *on the record* in which it considered TXO's motion and revealed the basis for its decision: TXO had embarked on a deliberate corporate scheme of land fraud and deception, which its highest officials knew to be wrong.[48]

[48] The court explained that it had "read everything" that TXO had submitted in its 45-page brief and would entertain oral argument, particularly on new matters that had not been the subject of prior trial rulings. Pet. App. 56a-57a. The court permitted TXO's counsel to argue at length regarding the supposed infirmities in the punitive damages award, *id.* at 59a-69a, 72a-73a,

TXO did not ask for additional explanation, nor claim that its absence would offend due process. The issue thus was waived. Moreover, although the trial court did not issue a written opinion, *Haslip* does not require one. As revealed by this Court's reliance on *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), *see Haslip*, 111 S. Ct. at 1044 (citing *Hammond*), the purpose of post-trial review by the trial judge is to assist the state appellate court to "discharge fairly its role of review." 493 So.2d at 1379. The trial court's post-trial review performed that function in the case at bar; indeed, the West Virginia Supreme Court came to *precisely* the same conclusion as the trial court concerning the reasons that the verdict was not excessive. West Virginia trial courts effectively police excessive damages,[49] and the post-trial review in this case was fully as effective as in the Alabama scheme upheld in *Haslip*.[50]

Furthermore, the implications of TXO's argument are breathtaking. The Federal Rules of Civil Procedure do not require a court to specify the grounds for decision in ruling on motions for new trial or remittitur, and the settled practice in many States, like

and TXO's counsel further directed the court's attention to the "rather lengthy arguments in its brief." *Id.* at 65a. The trial court explained to the parties that it drew a strong inference of malice from the testimony of TXO vice president Michael Good. *See* pp. 11-12, *supra*. In the court's words, "What could be more egregious than the vice president of a company saying . . . that he knew all along that this property belonged to Tug Fork?" Pet. App. 66a. Good, the court continued, "was the head man, wasn't he?" *Id.* at 67a. TXO's counsel conceded, "That's correct. He was the head of the Charleston office." *Ibid.*

[49] *See, e.g., O'Neal v. Peake Operating Co.*, 404 S.E.2d 420, 422-23 (W. Va. 1991); *Tri-State Asphalt v. McDonough Co.*, 391 S.E.2d 907, 912-13 (W. Va. 1990); *Berry v. Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367, 370 (W. Va. 1989); *Hardman Trucking, Inc. v. Poling Trucking Co.*, 346 S.E.2d 551, 552-53, 556-57 (W. Va. 1986); *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197, 199 (W. Va. 1982); *Addair v. Huffman*, 195 S.E.2d 739, 741 (W. Va. 1973).

[50] The Alabama Supreme Court explained that there are no fixed standards that a trial court must apply and that, in the end, the test is the common-law excessiveness rule. *Hammond*, 493 So.2d at 1379. Under Alabama law there is a presumption that the jury's verdict was proper. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222, 224 (Ala. 1989). TXO's own *amicus* demonstrates that the review is "extraordinarily deferential." Br. Alabama Bus. Council at 8.

West Virginia, is to the same effect.[51] TXO's implicit claim that the Federal Rules and settled state practice are unconstitutional in punitive damages cases is so far-fetched that not even TXO is willing to state it outright.

2. Any error was cured by the state supreme court's review

In *Haslip*, this Court implicitly indicated that two levels of judicial review were unnecessary, explaining that "*[t]he Alabama Supreme Court's post-verdict review*" — not post-trial review by trial courts — "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045; *cf. Clemons v. Mississippi*, 494 U.S. 738, 744-50 (1990). TXO's claim received careful appellate scrutiny — indeed, the West Virginia Supreme Court was "especially diligent in [its] review" in this pre-*Garnes* case, Pet. App. 32a — that rendered harmless any supposed infirmities at the trial level.[52]

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[51] *See* West Virginia R. Civ. P. 59; Fed. R. Civ. P. 59; 6A J. Moore, *Moore's Federal Practice* ¶59.11 (2d ed. 1991); *Fraidin v. Weitzman*, 611 A.2d 1046, 1067 (Md. App. 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991); *see also Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 804 (Utah 1991) (reason for decision needed only where trial judge grants motion for new trial, in order to make clear that court is not invading the province of the jury); *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 931 (1978) (similar rule); *Las Palmas Assocs. v. Las Palmas Center Assocs.*, 235 Cal. App.3d 1220, 1258 n.8 (Cal. App. 2 Dist. 1991); *Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532, 540 (Cal. App. 2 Dist. 1992); Cal. Code Civ. Proc. § 657. Accordingly, post-trial hearings on the record have been held to satisfy *Haslip* without the need for a written opinion. *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 603 (Tex. Civ. App. — El Paso 1991); *General Motors Corp. v. Saenz*, 829 S.W.2d 230, 241 (Tex. Civ. App. — Corpus Christi 1991). Only where a trial court ruling is insufficient to permit meaningful appellate review of the award is a new trial necessary. *E.g., Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991). And there is no need to introduce constitutional heavy artillery. Where an appellate court cannot discern the basis for a trial court's decision, it has ample authority to remand the case to the district court. 9 C. Wright & A. Miller, *Federal Practice & Procedure* ¶ 2518 (2d ed. 1983).

[52] There is no due process right to appeal in state courts, even in criminal cases, *see Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *McKane v. Durston*, 153 U.S. 684, 687 (1894), because there is no constitutional right to more than one full and fair hearing. This case is the flipside of that rule. There is no justification for reading *Haslip* as holding that a state court is required to render its decision in a certain manner or that a State is required to provide more than one level of judicial review to a particular claim. "The general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citation omitted).

C. The Appellate Review Satisfied Due Process

The West Virginia Supreme Court granted discretionary review, even though TXO failed to comply with the preannounced requirements for such review. *Garnes*, 413 S.E.2d at 910.[53] Thus, although the court would have been justified in denying review completely, it overlooked TXO's procedural error and applied a "flexible approach" in reviewing the reasonableness of the award. Pet. App. 32a.

But this "flexible approach" — produced by TXO's procedural error rather than by a supine judicial posture — was hardly the sort of meaningless review described by TXO. Rather, the court synthesized the nine *Garnes* factors and the considerations mentioned in *Haslip*. The court observed that "[t]he *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards." Pet. App. 35a. The court "appl[ied] the *Garnes* 'reasonable relationship' test" and looked to: "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." *Id.* at 39a-40a.

Contrary to TXO's claim that "there is no limit on punitive damages" for intentional wrongdoing under this test (Pet. Br. 42

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[53] The court explained that TXO had argued merely that "all of the technical requirements set forth in syllabus points 3 and 4 of *Garnes* were not met," Pet. App. 32a; TXO had not, as it was required to do, addressed with particularity each factor of the nine syllabus points by which excessiveness was to be determined and summarized the evidence presented to the jury and trial court on these points. Instead, TXO claimed simply that "the procedural requirements established in [*Garnes*] were not followed," TXO State Ct. Br. 8, and that summarizing evidence was unnecessary. TXO State Ct. Reply Br. 33. The court has denied review in similar cases. *See Davis v. Celotex Corp.*, 420 S.E.2d 557, 567 (W. Va. 1992); *Pote v. Jarrell*, 412 S.E.2d 770, 777 (W. Va. 1991).

n.42), the court's review ensured that the award would be limited to that "required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct." Pet. App. 39a.[54] The West Virginia Supreme Court has proved itself more than willing to reduce or eliminate excessive damages,[55] and the adoption of the stringent approach outlined in *Garnes* ensures that court will remain a leader among state courts in policing punitive damages awards.[56]

TXO's suggestion that it was subjected to a rough-and-ready "really stupid/really mean" analysis is preposterous. That discussion, however colorful,[57] was plainly dictum, as evidenced by the fact that it does not appear in the court-drafted syllabus,

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[54] Contrary to TXO's claim that "the West Virginia Supreme Court conducted no comparative analysis," Pet. Br. 41, in fact the court "examined all of the punitive damages opinions issued since *Haslip* was decided in an attempt to find some pattern in what courts find reasonable," Pet. App. 35a.

[55] *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (Neely, J.); *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795, 806-07 (W. Va. 1991); *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766, 773 (W. Va. 1990); *Bennett v. 3 C Coal Co.*, 379 S.E.2d 388, 394 (W. Va. 1989); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 80-81 (W. Va. 1986) (Neely, J.); *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 800 (W. Va. 1986) (Neely, J.); *Harless v. First Nat'l Bank*, 289 S.E.2d 692, 699, 702-06 (W. Va. 1982).

[56] The court recognized that "some courts have been less willing than this Court in *Garnes* to take seriously the U.S. Supreme Court's guidance," Pet. App. 28a, and the caselaw indeed reveals that the West Virginia court's review is unsurpassed in its extensiveness. Indeed, the review in many States is far less rigorous. *See, e.g., Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532, 537 n.4 (Cal. App. 2 Dist. 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1099 (5th Cir. 1991); *Coyne v. Allstate Ins. Co.*, 771 F. Supp. 673, 680 (E.D. Pa. 1991); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874-75 (Mo. App. 1991); *Oberg v. Honda Motor Corp.*, 814 P.2d 517, 524 (Ore. 1991).

[57] In truth, those labels were shorthand for well-understood distinctions in degrees of intentionality. Pet. App. 36a, 38a. Justice Neely has explained that the sometimes colloquial references in his writings "should be taken neither as evidence of cynicism nor as evidence of cavalier disregard" for the matter at hand. R. Neely, *How Courts Govern America* xii (1981). "Fifteen years ago as an instructor of undergraduates I learned that it is usually the funny, absurd, or ironic example which sustains the interest of people studying complicated and technical material." *Ibid.*

which under state law describes all "points adjudicated" by the court, West Virginia Const. Art. VIII, § 4, and by the fact that Chief Justice McHugh and Justice Miller joined in a *concurring* opinion (not in an opinion *concurring in the judgment*) in which they objected to the use of the unnecessary "really stupid/really mean" terminology. Pet. App. 53a. More fundamentally, the dichotomy was meant to *aid defendants* who, unlike TXO, have not been proved guilty of intentional, deliberate, and malicious wrongdoing. The West Virginia court's only point — which one would have thought the tort reform movement would embrace rather than assail — was that, in cases of "extreme carelessness," Pet. App. 36a, where compensatory damages "are neither negligible nor very large," *id.* at 38a, "the outer limit of punitive damages is *roughly* five to one." *Ibid.* Although this suggestion is more refined than some of the mathematical ratio rules advocated by TXO's *amici*, *see* Br. of Alabama Business Council at 18, it is of the same ilk. The proposed 5:1 limit is a substantive ceiling *in addition* to the procedural protection already afforded by *Garnes*. Whatever its merits, *see* Part I, *supra*, the proposed 5:1 limit is irrelevant in this case, where TXO "intentionally committed mean-spirited and harmful acts." Pet. App. 39a. TXO does not and cannot challenge this fact-based holding and thus in any event was not entitled to the benefit of Justice Neely's novel 5:1 proposal.

D. The Procedure Applied Was Not Void for Vagueness

TXO did not raise a "void-for-vagueness" argument before the West Virginia Supreme Court, and that court did not pass on it. The claim has no basis in the record of the case and is squarely foreclosed by this Court's holding in *Haslip*, 111 S. Ct. at 1046 n.12, which rejected the identical void-for-vagueness argument premised on *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Lower courts have rejected the argument as well,[58] and TXO provides no

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[58] *See, e.g., Las Palmas Assocs. v. Las Palmas Center Assocs.*, 235 Cal. App.3d 1220, 1259 (Cal. App. 2 Dist. 1991); *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1533 (W.D. Mo. 1992); *W.W. Mgt. & Dev. Co. v. Scottsdale Ins. Co.*, 769 F. Supp. 178, 179-81 (E.D. Pa. 1991); *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1099-100 (E.D. La. 1991); *Coyne v. Allstate Ins. Co.*, 771 F. Supp. 673, 676-77 (E.D. Pa.

reason to revisit, much less revise, this settled law.

First, standardless jury discretion, which rather than lack of notice was the theory of Justice O'Connor's void-for-vagueness argument in *Haslip*, *see* 111 S. Ct. at 1057-61, is not of concern here. The jury charge gave more guidance than that in *Haslip* and omitted the provision that damages were "entirely discretionary"; the trial court's post-trial review was as extensive as Alabama's; and the appellate review was unsurpassed in its rigor, despite TXO's procedural default. TXO's argument is premised on gross distortions of the proceedings below. In any event, TXO identifies no constitutional standard to measure the proper quantum of jury discretion in assessing punitive damages. *See* pp. 32-33, *supra*.

Second, a vagueness argument premised on lack of notice is also unavailing. When TXO hatched its scheme in 1985, it had notice that it faced punitive liability sufficient to punish and deter its wrongdoing, commensurate with the vast profits and large potential for social harm its scheme entailed.[59] *Wells v. Smith*, 297 S.E.2d 872, 878 (W. Va. 1982); *Leach v. Biscayne Oil & Gas Co.*, 289 S.E.2d 197 (W. Va. 1982). In *Wells*, the court held that punitive damages could be assessed even if a plaintiff suffered *no* actual damages, creating the possibility of truly astronomical (and indeed infinite) ratios between the two. *See* 297 S.E.2d at 880. This aspect of *Wells* was overruled in *Garnes*, 413 S.E.2d at 908 — *after*

1991); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 480 (9th Cir. 1977); *Gourley v. State Farm Mut. Auto. Ins. Co.*, 227 Cal. App.3d 1099, 1111 (Cal. App. 3 Dist. 1990); *Egan v. Mutual of Omaha Ins. Co.*, 133 Cal. Rptr. 899, 914 (Cal. App. 2 Dist. 1976); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 214 (Colo. 1984).

[59] TXO pretends that it was hit by a $10 million judgment like a bolt from the blue, when the fact is that TXO deliberately embarked on an intentional attempt to steal as much as $8.3 million in royalties, using means that have been unlawful since at least the year 1591. Pet. App. 14a. By its *own calculations* TXO faced a punitive award of anywhere from 2 to 10 times its expected gain. Pet. Br. 30 n.31. The relevant question certainly isn't whether a person could expect that "a proper punishment for slander of title could reach the level of $10 million for a single infraction," Pet. Br. 46 n.47; all acts of slander of title are not the same. The tort system awards damages based on the facts and circumstances of each case, not according to some advertised price list for intentional wrongdoing.

TXO's wrongdoing occurred.[60]

Moreover, notice of punitive damage liability is not constitutionally required. In *Haslip*, this Court rejected a void-for-vagueness attack identical to TXO's, explaining that "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." 111 S. Ct. at 1046 n.12. TXO attempts to distinguish this holding by pointing to alleged factual differences between the cases. Pet. Br. 46 n.47. These differences are contrived, but are in any event irrelevant because the force of the analysis in *Haslip* is squarely apposite here: so long as rules of primary conduct are clear, liability for their violation need not be spelled out with great precision in advance.[61] *Cf. Smith v. Wade*, 461 U.S. at 50. Any

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[60] TXO did not seek, and this Court did not grant, certiorari on the question of whether TXO had adequate notice of the West Virginia Supreme Court's formulation of the slander-of-title tort. Nonetheless, TXO attempts to argue that it should not be held liable for a common-law tort that had not theretofore been recognized in West Virginia, even though the tort has existed in common-law jurisdictions since at least 1591 (Pet. App. 14a). Indeed, slander of title is the subject of caselaw in every State but South Carolina, and the doctrine is included in the Restatement (Second) of Torts §§ 623A, 624 (1977). *See also* W.P. Keeton, *Prosser & Keeton on Torts* §128 (5th ed. 1984); Annot., *Allowance for Punitive Damages in Actions for Slander of Title*, 7 A.L.R.4th 1219. TXO also contends that the trial court and West Virginia Supreme Court erred in interpreting the state-law elements of slander of title. Pet. Br. 48. TXO's state-law objections are irrelevant, *see* n. 44, *supra*, and in any event wrong. The "actual malice" instruction given, J.A. 24, is fully consistent with the majority rule, *e.g.*, Restatement (Second) of Torts §623A(b) & comment (d). The trial court and state supreme court also followed "the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title." Pet. App. 20a (citing cases).

[61] Although advance notice of a penalty would no doubt permit an individual to calculate on a cost-benefit basis whether to comply with the law, such an interest is not protected by the Due Process Clause. *Cf. United States v. Dunnigan*, No. 91-1300 (Feb. 23, 1993). Indeed, deterrence is achieved in part by maintaining an element of unpredictability. *See Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 809 (Utah 1991); Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 324-25 (1991). The dictum in Justice Marshall's opinion in *United States v. Batchelder*, 442 U.S. 114, 123 (1979), is not to the contrary. This Court has never found the criminal penalty provisions of any statute too vague to

other rule would cast many criminal sentencing procedures — where concerns about vagueness are much more salient than they are here, *see Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) — into constitutional doubt.[62]

CONCLUSION

In the end, TXO and its *amici* focus less on the decision below than on what they advertise as a punitive damages "crisis," and what other *amici* contend is largely a mirage created by a concerted and well-financed public relations campaign. Whatever the outcome of that debate, this Court reviews judgments in cases and controversies, not complex matters of public policy. This case is the admittedly unusual instance where considerations of deterrence and punishment easily justify a 526:1 ratio of punitive damages to out-of-pocket loss. If TXO's *amici* are to be believed, there are many other, more suitable cases in which the need for restrictions on punitive damages could be far better evaluated.

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satisfy due process. Moreover, the authorities on which the *Batchelder* dictum rests are two statutory interpretation cases, *see United States v. Evans*, 333 U.S. 483 (1948); *United States v. Brown*, 333 U.S. 18 (1948), and *Giaccio*, which this Court in *Haslip* noted was inapposite because it involved lack of standards in determining what *conduct* was prohibited.

[62] The effective range for first-degree felonies in Utah, for example, is effectively zero to life. *See* Riggs, *supra*, at 912 n.189; *see also Stevens v. Armatrout*, 787 F.2d 1282 (8th Cir. 1986) (upholding constitutionality of sentence of 200 years under statute providing for sentence of "any term of years").

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APPENDIX TO BRIEF OF RESPONDENTS

This Appendix is a survey of the caselaw in 37 States in which the finder of fact either is *permitted* to consider evidence regarding a defendant's wealth in assessing punitive damages or is *required* to do so. Decisions holding the former are indicated with a parenthetical "may"; decisions holding the latter are indicated with a "must."

Alaska

Clary Ins. Agency v. Doyle, 620 P.2d 194, 205 (Alaska 1980) (may); *Ben Lomond, Inc. v. Campbell*, 691 P.2d 1042, 1048 (Alaska 1984) (may).

Arizona

Hawkins v. Allstate Ins. Co., 733 P.2d 1073 (Ariz.), *cert. denied*, 484 U.S. 874, *and reh'g denied*, 484 U.S. 972 (1987) (may); *Puz v. McDonald*, 680 P.2d 213, 215 (Ariz. Ct. App. 1984) (may).

Arkansas

Viking Ins. Co. v. Jester, 836 S.W.2d 371, 379 (Ark. 1992) (may); *Porter v. Lincoln*, 668 S.W.2d 11, 14 (Ark. 1984) (may).

California

Neal v. Farmers Ins. Exchange, 582 P.2d 980, 990 (Cal. 1978) (may); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 210 (Cal. Ct. App. 1984) (may).

Delaware

Strauss v. Biggs, 525 A.2d 992, 1000 (Del. 1987) (may); *Jardel Co. v. Hughes*, 523 A.2d 518, 527 (Del. 1987) (may).

District of Columbia

Levine v. Mills, 114 A.2d 546, 549 (D.C.), *aff'd in part*, 233 F.2d 16 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 858 (1956)(applying law of District of Columbia) (may); *Curry v. Giant Food Co.*, 522 A.2d 1283, 1290 (D.C. Cir. 1987)(applying law of District of Columbia) (may).

Florida

Bould v. Touchette, 349 So.2d 1181, 1187 (Fla. 1977) (may); *Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 689 (Fla. 1969) (may).

Hawaii

Man v. Raymark Industries, 728 F. Supp. 1461, 1467 (D.Haw. 1989)(applying Hawaii law) (may); *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1352 (D.Haw. 1975)(applying both federal and Hawaii law) (may).

Idaho

Dwyer v. Libert, 167 P. 651, 653-54 (Idaho 1917) (may); *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 772 (9th Cir. 1984) (applying Idaho law as to damages) (may).

Illinois

Black v. Iovino, 580 N.E.2d 139, 149-50 (Ill. Ct. App. 1991), *app. denied*, 587 N.E.2d 1011 (Ill. 1992) (must); *Central Bank-Granite City v. Ziaee*, 544 N.E.2d 1121, 1126-27 (Ill. Ct. App. 1989), *app. denied*, 548 N.E.2d 1067 (Ill.) (may).

Indiana

Dow Chemical Co. v. St. Vincent Hosp. & Health Care Center, Inc., 553 N.E.2d 144, 157 (Ind. Ct. App. 1990) (may); *Archem, Inc. v. Simo*, 549 N.E.2d 1054, 1058 (Ind. Ct. App. 1990), *cert. dismissed*, 111 S. Ct. 944 (1991) (may).

Iowa

Poulsen v. Russel, 300 N.W.2d 289, 295 (Iowa 1981) (may); *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 424 (Iowa 1977) (may).

Kansas

Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1238-39 (Kan. 1987) (may); *Henderson v. Hassur*, 594 P.2d 650, 665 (Kan. 1979) (may).

Maine

Caron v. Caron, 577 A.2d 1178, 1180-81 (Me. 1990) (must); *Saunders v. Van Pelt*, 497 A.2d 1121, 1127 (Me. 1985) (must).

Maryland

Heinze v. Murphy, 24 A.2d 917, 921 (Md. 1942) (may); *Thorne v. Contee*, 565 A.2d 102, 111 (Md. Ct. App. 1989), *cert. denied*, 569 A.2d 643 (Md. 1990), *and cert. denied*, 569 A.2d 1242 (Md.) (may).

Minnesota

Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 740 (Minn.), *cert. denied, sub nom Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980) (may); *GN Danavox v. Starkey Labs.*, 476 N.W.2d 172, 177 (Minn. Ct. App. 1991) (may).

Mississippi

Employers Mut. Cas. Co. v. Tompkins, 490 So.2d 897, 907-08 (Miss. 1986) (must); *C&C Trucking Co. v. Smith*, No. 90-CA-0366, 1991 WL 389051, *8-11 (Miss. 1991) (may).

Missouri

Seested v. Post Printing & Pub. Co., 31 S.W.2d 1045, 1054 (Mo. 1930) (may); *Lipari v. Volume Shoe Corp.*, 664 S.W.2d 953, 959, 959 n.2 (Mo. Ct. App. 1983) (may).

Montana

Zugg v. Ramage, 779 P.2d 913, 917 (Mont. 1989) (may); *Gibson v. Western Fire Ins. Co.*, 682 P.2d 725, 740 (Mont. 1984) (may).

Nevada

Ainsworth v. Combined Ins. Co., 763 P.2d 673, 677 (Nev. 1988), *cert. denied*, 493 U.S. 958 (1989) (may); *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 746 P.2d 132, 137-38 (Nev. 1987) (may).

New Jersey

Herman v. Sunshine Chemical Specialties, Inc., 608 A.2d 978, 983 (N.J. Super. Ct. App. Div.), *cert. granted*, 614 A.2d 620 (N.J. 1992) (may); *Leimgruber v. Claridge Associates, Inc.*, 375 A.2d 652, 655 (N.J. 1977) (may).

New Mexico

DeMatteo v. Simon, 812 P.2d 361, 364 (N.M. Ct. App. 1991) (may); *Gonzales v. Sansoy*, 703 P.2d 904, 908 (N.M. Ct. App. 1984) (may).

North Carolina

Willeford v. Bailey, 43 S.E. 928, 929-30 (N.C. 1903) (must).

North Dakota

Olmstead v. First Interstate Bank, N.A., 449 N.W.2d 804, 810 (N.D. 1989) (may); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 754 (N.D. 1989) (may).

Ohio

Wagner v. McDaniels, 459 N.E.2d 561, 564 (Ohio 1984) (may); *Hayner v. Cowden*, 27 Ohio St. 292, 296-97 (1875) (may).

Oklahoma

Mitchell v. Ford Motor Credit Co., 688 P.2d 42, 46 (Okla. 1984) (may); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986)(applying Oklahoma law) (may).

Rhode Island

Hargraves v. Ballou, 131 A. 643, 646 (R.I. 1926) (may); *Emery Waterhouse Co. v. Rhode Island Hospital Trust Nat. Bank*, 757 F.2d 399, 410-11 (1st Cir. 1985)(applying Rhode Island law) (may).

South Carolina

Gamble v. Stevenson, 406 S.E.2d 350, 354 n.3 (S.C. 1991); *Patterson v. Bogan*, 198 S.E.2d 586, 590 (S.C. 1973) (may).

South Dakota

Hulstein v. Meilman Food Industries, Inc., 293 N.W.2d 889, 892 (S.D. 1980) (may); *Davis v. Merill Lynch, Pierce, Fennder & Smith, Inc.*, 906 F.2d 1206, 1225 (8th Cir. 1990) (applying South Dakota law) (may).

Tennessee

Andersen v. Latham Trucking Co., 728 S.W.2d 752, 754 (Tenn. 1987) (may); *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W.2d 72, 74 (Tenn. 1985) (may).

Texas

Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988) (may); *State Farm Mut. Life Ins. Co. v. Zubiate*, 808 S.W.2d 590, 602 (Tex. Civ. App. 1991) (may).

Utah

Cruz v. Montoya, 660 P.2d 723, 727 (Utah 1983) (must); *Nelson v. Jacobsen*, 669 P.2d 1207, 1219 (Utah 1983) (must).

Vermont

Lent v. Huntoon, 470 A.2d 1162, 1172 (Vt. 1983) (may); *Parker v. Hoefer*, 100 A.2d 434, 446-47 (Vt. 1953) (may).

Virginia

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Supreme Court, U.S.
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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP.; TUG FORK LAND COMPANY; GEORGE KING; and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY BRIEF OF PETITIONER

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In its opening brief, TXO demonstrated that the $10 million punitive award in this slander of title case violates due process because it (1) eclipses by orders of magnitude any previous punitive award for similar conduct; (2) far exceeds any amount plausibly appropriate to further West Virginia's stated goals; and (3) was the product of passion and prejudice unconstrained by appropriate procedural safeguards.

Unable to defend the judgment on its own terms, respondents attempt to deal themselves a new hand. First, they ignore the controlling fact that this case was tried and decided *only* on a claim of slander of title. Respondents now attempt, through multiple mischaracterizations of the record, to persuade this Court that TXO was guilty of a wide variety of other misconduct, including fraud, subornation of perjury, and extortion. No such claims were presented to the jury for decision, and certainly none was proven.

Second, ignoring the limitations of record and presuming to set state policy, respondents for the first time combine a series of extra-record factual assumptions with their own economic theory to create a new "expected gain" justification for the $10 million award. No such theory was raised below, nor has anything remotely similar been endorsed by West Virginia. Moreover, the record evidence is insufficient to apply the theory here. Finally, respondents' new economic theory is flawed. Basing TXO's punishment on some measure of expected gain would lead only to arbitrary wealth redistribution; it would *not* further West Virginia's deterrence goal.

Third, respondents answer TXO's procedural arguments with misguided claims of "waiver," and with a misplaced charge that TXO seeks to elevate *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), to a rigid code of federal procedure for punitive damages. This strawman approach cannot disguise this fundamental fact: West Virginia's "really mean"/"really stupid" standard—which not even respondents defend—is a far cry from the multiple checks that in *Haslip*

ensured that "punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045.

I. TXO's substantive due process argument is firmly grounded in this Court's due process decisions. West Virginia, like other jurisdictions, imposes punitive damages for two reasons: to punish wrongdoers and to deter similar misconduct. Accordingly, the Due Process Clause guarantee against "'arbitrary action of government,'" *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted), demands that punitive awards rationally further *those* government interests, and not merely redistribute wealth arbitrarily. If the challenged award is within the range of penalties that numerous courts and legislatures have deemed appropriate to punish and deter similar conduct, the jury's determination is entitled to great deference. See *Haslip*, 111 S. Ct. at 1045. If, however, the challenged award strays far beyond the bounds of contemporary and historical practice, serious doubts about the constitutional propriety of the award are raised, triggering meaningful means-ends review to ensure that the award is not "so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). *Cf. Jackson* v. *Virginia*, 443 U.S. 307, 314, 317 (1979).

TXO does *not* argue that the Constitution requires punitive damages to be limited to some fixed multiple of compensatory damages or by pre-existing punitive awards. Rather, TXO submits that the considered judgments of courts and legislatures are valuable objective indicia of whether an award rationally furthers legitimate state goals or is the impermissible product of passion and prejudice. This Court has recognized as much both in the punitive damages context, see *Haslip*, 111 S. Ct. at 1045-46 (approving Alabama's practice of "undertak[ing] a comparative analysis" of punitive awards), and more generally, see, *e.g.*, *Schad* v. *Arizona*, 111 S. Ct.

2491, 2501 (1991) (relying upon "history and widely shared practice").

Respondents' claim that common-law courts have never relied upon objective indicia is simply wrong. The tradition of comparing challenged punitive awards to previous awards for similar conduct is well established both in West Virginia [1] and in other States.[2] That comparison has included consideration of punitive-to-compensatory award ratios.[3] Similarly, courts frequently compare punitive awards to statutory fines for like conduct.[4]

TXO demonstrated that the $10 million award assessed here exceeds by orders of magnitude any previous penalty for similar conduct. Respondents cite no contrary evidence.[5] At a minimum, this history and wide practice

[1] *See, e.g., Hinerman* v. *Daily Gazette Co.*, 423 S.E.2d 560, 578 n.28 (W. Va. 1992), *cert. denied*, 61 U.S.L.W. 3606 (U.S. 1993); *Davis* v. *Chesapeake & Ohio Ry.*, 56 S.E. 466, 463 (W. Va. 1907).

[2] *See, e.g., Continental Eagle Corp.* v. *Mokrzycki*, 611 So.2d 313, 322 (Ala. 1992); *Coty* v. *Ramsey Assocs., Inc.*, 546 A.2d 196, 207 (Vt.), *cert. denied*, 487 U.S. 1236 (1988); *Mutual Life Ins. Co.* v. *Estate of Wesson*, 517 So.2d 521, 533 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988); *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204 (Cal. Ct. App. 1984); *Moore's, Inc.* v. *Garcia*, 604 S.W.2d 261, 266 (Tex. Civ. App. 1980); *Lisowski* v. *Chenenoff*, 155 N.W.2d 619, 632 (Wisc. 1968).

[3] *See, e.g., Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1045 (1991) (approving Alabama scheme that required that punitive damages bear an "understandable relationship to compensatory damages"); *Leach* v. *Biscayne Oil & Gas Co.*, 289 S.E.2d 197, 199-200 (W. Va. 1982); *Ennis* v. *Brawley*, 41 S.E.2d 680, 686 (W. Va. 1946).

[4] *See, e.g., Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part); *Pendleton* v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (W. Va. 1918).

[5] Instead, respondents cite eighteenth-century English decisions approving "dramatic ratios" between puntive and compensatory awards. Resp. Br. 28. But those cases provide no support for an enormous punitive-to-compensatory ratio in this *slander of title* case since, as respondents concede, Resp. Br. 28 n.26, none of them had

provide a strong indication that TXO's punishment reflects passon and prejudice.

The issue is thus whether such an extraordinary penalty can be justified as furthering some legitimate state policy. Respondents concede that means-ends review is appropriate, but they urge the Court to apply the super-deferential standard used in reviewing legislative policy judgments on economic matters. The challenged award is so plainly excessive that it fails even that standard. But this case does *not* involve a considered legislative policy judgment. On the contrary, TXO's punishment was meted out by a single jury, and the democratic and institutional competency concerns that justify relaxed review of legislative judgments are therefore not present. Compare *Nordlinger* v. *Hahn*, 112 S. Ct. 2326 (1992) (upholding a legislative policy judgment), with *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989) (striking down as irrational the aberrational *enforcement* of a similar legislative judgment). Here, this key institutional distinction is combined with abundant objective evidence that the challenged award is arbitrary, and not the rational application of state policy; therefore the case for rigorous review is clear. Compare *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985), with *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).[6] Cer-

anything to do with slander of title or remotely similar conduct. Moreover, those early decisions reveal much more about the historical unavailability of some types of compensatory damages than they do about punitive damages. *See, e.g., Rookes* v. *Barnard*, 1 All E.R. 367, 412 (H.L. 1964) (Lord Devlin).

[6] Constitutionally required means-ends review of this award raises no serious federalism concerns. "By its terms, the Fourteenth Amendment contemplates interference with state authority." *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2405 (1991). *See also Ex parte Virginia*, 100 U.S. 339, 345 (1879). The "interference" here is minimal. TXO does not suggest that the Due Process Clause sets any arbitrary caps on punitive damages. Rather, that Clause requires only that States ground their punitive awards in *some* legitimate theory, and that awards not exceed the outer limits imposed by reasonable application of the chosen theory.

tainly, due process requires more than the "means-ends" approach adopted by the court below, *viz.*, if you were "really mean," then that "ends" the due process inquiry.

A. TXO's punishment cannot be justified as reasonably furthering West Virginia's retributive theory, which embodies the universally recognized principle of proportionality between punishment and crime.[7] Although the proportionality principle does not admit of bright-line distinctions, even the most deferential review reveals that this award turns that principle on its head. TXO's punishment is 20 times higher than any ever before upheld in West Virginia in *any* type of case (and 10 to 100 times larger than the largest penalties for slander of title imposed elsewhere). Slander of title, a tort which threatens only financial harm, cannot plausibly be 20 times more "reprehensible" than any other tortious conduct.

1. Respondents "avoid" this problem by abandoning the claim they brought against TXO in favor of a fictional story of extortion, fraud, and subornation of perjury. But the jury determined *only* that TXO recorded a quit-claim deed in reckless disregard of its truth or falsity.[8] Whatever the merit of this finding, one thing is plain: no other misconduct was presented to the jury for decision. Obviously, a punitive award assessed in a slander of title case cannot years later be rationalized as punishment for uncharged (and dissimilar) acts.[9]

[7] Regardless whether the Fourteenth Amendment embodies the proportionality principle, *see Harmelin* v. *Michigan*, 111 S. Ct. 2680 (1991) (opinion of Scalia, J.), where a State justifies its punitive awards on that principle, the Due Process Clause requires that the State rationally apply its chosen theory.

[8] Although respondents repeatedly stress the intentional nature of slander of title, the jury was instructed that the standard in West Virginia is recklessness. *See* J.A. 23-24. In concluding that "the jury found the requisite malice," Pet. App. 19a, the decision below fails to note that the "requisite malice" was defined to include "reckless disregard of the other parties' rights." *See* J.A. 28-29.

[9] *Cf. Dunn* v. *United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was neither alleged in an indict-

It was no accident that respondents sought to recover from TXO only for slander of title: no fraud, extortion or subornation of perjury occurred. Indeed, having initially charged TXO with fraud, respondents *abandoned* that claim at trial.[10] Respondents as plaintiffs below *did not even request an instruction on fraud.* And the new allegations of "extortion" are "supported" solely by vague reference to two "threatening" letters. These letters (reproduced as App. A and App. B, *infra*)[11] demonstrate only that TXO informed respondents of the title problem and attempted to resolve the matter equitably. Finally, the claimed "subornation of perjury" rests on the erroneous premise that TXO knowingly sought a false affidavit, when, in fact, the record demonstrates that there was *no* inconsistency between the proposed affidavit and any previous statements of the affiant.[12]

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ment nor presented to a jury at trial offends the most basic notions of due process").

[10] Moreover, even if TXO had committed the acts fabricated in respondents' brief, respondents plainly suffered *no* compensable injury from any of those acts. And it is settled in West Virginia that punitive damages are prohibited in cases where no compensatory damages are awarded. *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). If West Virginia would not permit punitive damages if TXO *were* adjudged liable for this fictional misconduct, the State plainly has no interest in punishing TXO in the absence of a finding of liability.

[11] These appendices, as well as appendices C, D, and E to this brief, contain only record evidence.

[12] TXO's only previous contact with the putative affiant was a phone call in which he stated he "thought" he had purchased only coal rights from respondents. Tr. 1645. The affidavit stated merely that "there was no *specific agreement* on the part of myself or Tug Fork Land Company as to whether or not the oil and gas were to be reserved by Tug Fork Land Company in the attached deed." Tr. 1780 (emphasis added). TXO employee Wood testified that he wanted the affidavit signed only "if it was correct." Tr. 603-07. No contrary evidence was introduced. Respondents attempt to overcome these factual hurdles by repeatedly quoting their own counsel's questions as substitutes for the witness' testimony. *Compare* Resp. Br. 7 *with* Tr. 596; Resp. Br. 8 *with* Tr. 597.

2. The *only* relevant act in this case is the deed recordation that the jury found slandered respondents' title. And the record clearly shows that this sole act, even if tortious, was not so egregious as to justify a punitive award 526 times the compensatory award. Before drilling a well, TXO requested a title opinion from Larry Skeen, chairman of the mineral law committee of the state bar, author of *West Virginia Oil & Gas Law* (Michie 1984), and former West Virginia Assistant Attorney General in charge of natural resources. Skeen & Skeen's title opinion (which respondents never challenged as lacking independent professional judgment) concluded: "[I]t is our opinion that Virginia Crews Coal Company has a better title to the oil and natural gas under the subject realty . . . than [do respondents]." App. C, *infra*, at 37a. See also App. D, *infra*.[13]

As the West Virginia Supreme Court recognized, *any* cloud on title is a serious matter in the oil and gas business:

> No one disputes that before beginning to drill, any reasonable businessman would want to clear up any clouds on the title to the oil and gas rights, no matter how small. Therefore, we understand that before investing hundreds of thousands of dollars in an exploratory well on the Blevins Tract, TXO would

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[13] Skeen & Skeen relied upon two facts: (1) In 1958 respondent Tug Fork granted to Leo Signaigo "all the coal *and other minerals* and mineral substances" underlying the Blevins tract. Pet. App. 43a (emphasis added). Later provisions appeared to reserve *some* oil and gas rights to Tug Fork, but inartful drafting left it unclear whether Tug Fork had reserved *all* the oil and gas or only that portion associated with a particular coal seam. *See* Pet. App. 46a, 49a (¶¶ 2, 6 of the 1958 Deed). (2) After 1958 respondents did not have *any* interest in the oil, gas or coal assessed for taxes as required of West Virginia property owners; instead, Signaigo and his successors paid those taxes. The Skeens deemed this an "important indicia of ownership." App. C, *infra*, at 35a. Together, these circumstances created what title attorney Robert J. Wallace, trustee of the Eastern Mineral Law Foundation and a former West Virginia State Bar President, later characterized as "a most serious title defect or cloud on title. If abstracting this title I would not certify the title." App. E, *infra*, at 46a.

> have wanted to fork out $6,000 for an insurance policy against litigation in the form of a quit-claim deed.

Pet. App. 12a. That, of course, is exactly what TXO did —relying on the advice of counsel,[14] it obtained and recorded a quit-claim deed. *This* is the "heinous conduct," see Resp. Br. 1, for which TXO was found liable.

Respondents claim that although this slander of title appears innocuous and caused no harm, it "threatened 'millions of dollars' in harm." Resp. Br. 1 (quoting Pet. App. 40a). On the contrary, TXO's *slander of title* threatened *no* harm to respondents. Slander of title focuses on the harm to a property owner caused by a decline in property value. See Pet. App. 17a. No such decline occurred (the jury awarded only attorneys' fees) or was threatened here, because TXO cleared any cloud on title resulting from its "slander" through its declaratory judgment action. TXO could have eliminated respondents' royalties only by judicial declaration that TXO, not respondents, held title to the Blevins tract oil and gas. In that event, however, there would be no basis for *any* damages, because respondents' (nonexistent) title obviously could not have been slandered. There was no near miss by "harmful acid," Resp. Br. 1-2; rather, this case is about a direct hit on the "deep pocket" of an out-of-state defendant.[15] See *Haslip*, 111 S. Ct. at 1045.

3. How then did a jury reach the conclusion that TXO should pay $10 million for "reckless deed recordation?" Two factors ensured that the verdict would be the unconstitutional product of passion and prejudice. First, over TXO's repeated objection, respondents showed the jury

[14] Respondents misleadingly claim that the testimony of TXO employee Mike Good suggests that TXO knew its counsel's advice to be wrong. Good testified that although in his "layman's opinion" Tug Fork probably had good title, he was "not an attorney" and therefore had to rely on advice of counsel. Tr. 657.

[15] Moreover, there was no threat of multi-million-dollar harm even accepting respondents' fictional account of TXO's misconduct. *See infra* pp. 10-12.

videotaped depositions of out-of-state attorneys who testified regarding their opinions as to *alleged* conduct by TXO in other States. *None* of this largely hearsay testimony had anything to do with this case or slander of title.[16] Typical of this "evidence" was the testimony of Allen Devore, an Oklahoma attorney, who testified regarding "the *Freede* case." Mr. Devore, who was neither witness, nor party, nor record counsel in the *Freede* case, based his opinions solely upon his review of court papers *the morning of his deposition.* Tr. 313-19. Yet he unabashedly told the jury that "TXO has violated the rights of Dr. Freede and hundreds or thousands of other people across the nation." Tr. 315. Subsequent to the West Virginia trial, TXO *won* the *Freede* case in a jury trial. See Pet. App. 24a.[17] The presentation of such "evidence" allowed the jury to conclude that it sat as a national tribunal with a mandate to punish this out-of-state corporation for any and all "bad acts."

Second, on the critical question of how to calculate an appropriate punitive award, the jury was given near-absolute discretion and *no* guidance on how to exercise that discretion to further state policy. To make matters worse, the *only* concrete advice given the jury was that its award should reflect TXO's status as a wealthy out-of-state corporation.[18] This obsessive focus on wealth obviously invited the jury to redistribute wealth.

[16] It is bad enough that some of this "evidence" was admitted at trial. Respondents go even further in their attempts to portray TXO negatively, and cite portions of the testimony that even the trial court judge rejected. *Compare* Resp. Br. 14 (citing Tr. 202, 274-75) *with* Tr. 186, 257.

[17] The out-of-state attorneys reviewed allegations made in five cases. Three had been settled without any admission of liability (Tr. 197, 225, 250, 276) and the other two were still pending (Tr. 303, 312). Although the *Freede* case was the only case actually tried, the court below dismissed TXO's victory, commenting that "even a blind hog finds an acorn now and again." Pet. App. 28a n.9.

[18] *See, e.g.*, J.A. 34 (jury instruction) ("In assessing punitive damages, if any, you should take into consideration . . . the wealth of the perpetrator"); Tr. 782 (respondents' closing argument) ("You can fine TXO one percent [of its wealth] if you want. . . .").

Respondents contend that these errors were harmless, because the award was given "searching review" by a judge respondents characterize as "an outspoken critic of punitive damages." Resp. Br. 15 (emphasis omitted). This attempt to justify affirmance by characterizing the opinion writer's views seems odd. But if it is proper, TXO submits that Justice Neely's self-description is more revealing:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families and their friends will reelect me.

Richard Neely, *The Product Liability Mess* 4 (1988).[19]

B. Nor can TXO's punishment be justified on deterrence grounds. Respondents argue that $10 million is justified because TXO expected to "misappropriate a stream of royalties worth between $5.0 million and $8.3 million." Resp. Br. 1. There are a number of fatal defects in this theory. First, respondents' "expected gain" theory is manufactured for the first time in their brief to this Court. No such theory was presented to the jury, the trial judge, or the West Virginia Supreme Court. Nor did that court mention respondents' theory as a basis for upholding the challenged award. Indeed, the West Virginia Supreme Court has *never* held that basing punitive awards on some *post hoc* measure of "expected gain" promotes West Virginia policy.[20]

Second, there is no way to establish *on this record* that respondents' theory supports the $10 million award. Because the argument was not raised below, neither side introduced evidence to prove TXO's expected gain. Only now do respondents proclaim that three figures included in documents and testimony introduced for other purposes are all that is necessary to infer that TXO expected to gain $5 million.

[19] *See also* Richard Neely, *The Product Liability Mess* 1 (1988) ("As a state court judge, much of my time is devoted to designing elaborate new ways to make business pay for everyone else's bad luck").

[20] In its exhaustive treatment of punitive damages in the *Garnes* case, for example, which established a whole series of permissible considerations, "expected gain" was never mentioned.

Oil and gas economics are hardly that simple. Respondents' eleventh-hour calculation of expected gain rests upon a series of assumed facts that appear nowhere in the record. Those extra-record factual assumptions illustrate the danger of the appellate fact-finding respondents urge —even a cursory examination demonstrates that respondents' thumbnail estimate is off by orders of magnitude. Respondents assume, *inter alia*, that: (1) TXO had a 100 percent chance of *eliminating* all royalties;[21] (2) TXO would own 100 percent of the (slandered) Blevins tract;[22] (3) the initial well and each of 14 possible successive wells had a 100 percent chance of success;[23] (4) TXO would receive all oil and gas revenues instantaneously;[24] and (5) TXO would pay *no* taxes.[25] Thus, it is plain that the record does not contain sufficient information to determine what TXO's expected gain might have

[21] But under respondents' own theory, TXO expected to *reduce*, not eliminate royalties. See Resp. Br. 10; Pet. App. 7a.

[22] An unrelated entity, the APCOT-FINADEL Joint Venture, had rights to 25 percent of TXO's interest (and therefore 25 percent of any gain from slander of title). *See* Tr. 685.

[23] Had the issue been raised, TXO could have demonstrated that oil and gas drilling is quite risky. As with any well, there was a significant risk that the wells would be dry or not as successful as hoped. (Indeed, that is exactly what happened.)

[24] In fact, revenues from a successful well would have been stretched out over at least 20 years. Tr. 97. At a reasonable oil and gas discount rate of 15 percent, a dollar received in 20 years is worth only *6 cents* today. *See* Eugene F. Brigham, *Financial Management: Theory and Practice* 837 (3d ed. 1982).

[25] If the expected gain issue had been raised, TXO could have demonstrated that any proceeds would have been subject to property, severance, and income taxes, which would substantially reduce any expected gain (possibly by 50% or more).

been and certainly not enough to support a $10 million penalty.[26]

Third, respondents' "expected gain" theory, adopted wholesale from the brief of the West Virginia Trial Lawyers ("Trial Lawyers"), is simply wrong. Respondents' premise is that the *expected* legal sanction associated with committing a tort should be equal to the expected gain, thereby causing potential tortfeasors to perceive the activity as unprofitable. TXO agrees. Respondents err, however, in assuming that the *actual* legal sanction must be set at the expected gain. A potential tortfeasor's *expected* legal sanction turns on the *rule* of punitive damages that can be inferred from prior cases, not the absolute amount of the award in a particular case.[27]

This distinction is particularly important in the context of slander of title. The scheme that respondents attribute to TXO—falsely claiming title to property in an attempt to induce ownership concessions—is one in which the slanderer's expected gain is *exactly equivalent* to the expected harm to his victim. Every dollar gained by the slanderer (by virtue of his increased ownership interest) is necessarily a dollar lost by the victim.[28]

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[26] If respondents *had* sought to justify an award on this theory they would, of course, have faced significant hurdles in proving the relevance of expected gain and in establishing as a factual matter that TXO's expected gain was anywhere close to the fabricated figures they bandy about in this Court. There is certainly no basis for this Court to divest state juries and courts of their proper roles in this fact-finding process.

[27] Professor Morris recognized this 60 years ago. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1184 (1931) ("even though he is treated leniently in a particular case, he is made to realize the risk of forbidden conduct, and the knowledge of risk will discourage similar misconduct, even though the particular judgment happens to be small").

[28] The Trial Lawyers stress that undeterred torts can cause social harm beyond the harm to the victim—*e.g.*, oil and gas production could be retarded if slander of title left owners uncertain about rights of ownership. Although undoubtedly true, that observation merely supports *some* award of punitive damages (*i.e.*, the amount necessary to deter the wrongful conduct); it is irrelevant to the question what *amount* of punitive damages is necessary to achieve that goal.

Thus, punishing all such schemes with awards of full compensatory damages would completely deter such misconduct, because the *expected* legal sanction—damages sufficient to compensate the victim for this expected injury—is exactly equivalent to the expected gain. The Trial Lawyers posit a scheme that (whether successful or not) will be punished half of the time. Since only *half* of such schemes are detected and punished, the total award must be *twice* what would be awarded if all such schemes were detected and punished. Applying those assumptions (and rational deterrence theory) here yields a punitive award of $19,000 (in addition to the $19,000 compensatory award). Because of the rule it embodies —*i.e.*, the penalty for such conduct is twice the harm caused—that $38,000 award will deter all similar schemes *no matter how large the expected payoff*.[29]

Thus, if slandering title to obtain ownership concessions goes unpunished half of the time, assessing TXO with a punitive award of $19,000 (and a total award of $38,000) would fully serve West Virginia's deterrence goal.[30] The enormous excess actually awarded can only

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[29] For example, the Trial Lawyers posit a later scheme with a potential payoff of $10 million. With a 50 percent chance of success, one contemplating this scheme expects to gain $5 million. However, he must balance this expected gain against the expected legal sanction. (Because there is a 50% chance that his scheme will cause no harm (unsuccessful) and a 50% chance that it will cause $10 million in harm (successful), the *expected* harm is $5 million.) A damage award (compensatory plus punitive) of twice that expected harm is $10 million, which when multiplied by the 50 percent chance of being caught and punished, yields an expected legal sanction of $5 million. The expected legal sanction equals the expected gain, there is no profit in the scheme, and the slander is deterred.

[30] This is not to say that expected gain is never relevant. For some torts, product liability, for example, expected gain may bear little relation to expected harm. Accordingly, it is possible in that

deter legitimate business conduct contrary to West Virginia policy,[31] and is nothing more than arbitrary redistribution of wealth.[32]

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context that a legal sanction based upon actual harm (and the risk of escaping punishment) would not deter the activity.

[31] Respondents claim that because slander of title is an *intentional* tort, the Court should not be concerned that the punitive award far exceeds the amount necessary to meet state goals. However, intentionally recording a deed is "bad" only if the deed is false. Falseness is established after the fact, and in West Virginia, reckless disregard of the truth will suffice. Accordingly, the risk of overdeterrence is real, and as the decision below recognized, "we do not want to discourage people from making legitimate (through possibly weak) claims [to property]." Pet. App. 15a.

[32] Respondents also argue that the $10 million award is reasonable "in light of [TXO's] wealth." Resp. Br. 24. This Court has already cautioned against overreliance on this prejudicial factor, *see Haslip*, 111 S. Ct. at 1045, and where, as here, the defendant is a corporation, the entire premise of any wealth-based deterrence argument—*i.e.*, that the wealthy place a lower value on marginal income—is missing. Corporations are not "wealthy;" they are owned by investors who are frequently of average wealth. *See, e.g., Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992).

Recognizing this weakness, respondents' amici favor a "size" argument—they contend that a $10 million award is reasonable because TXO is "large," and only an enormous penalty will get the attention of senior management. It is wholly irrational, however, to assume that the only people with incentives to reduce corporate losses are senior management. Large modern corporations like TXO are organized in operationally autonomous divisions with middle managers evaluated on the basis of profits, ability, and the success of their individual divisions. *See* Coffee, *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 397 (1981). Thus, managers at such corporations tend to be as cost-conscious as managers at smaller companies. It is no surprise, therefore, that TXO's West Virginia managers went to great lengths to negotiate a few thousand dollars from the price of the quit-claim deed. *See* App. B, *infra*, at 7a. It is absurd to presume that these same managers could not be motivated by a moderate, but not trivial, punitive award. Neither TXO's wealth nor its size provides any rational basis for increasing the penalty a *hundred-fold* over the amount that would be necessary to deter "Jeff's Neighborhood Hotdog Stand." *See* Pet. App. 39a.

In sum, the extraordinary penalty assessed against TXO cannot plausibly be justified as necessary to further any legitimate state goal. *See, e.g., Haslip*, 111 S. Ct. at 1045 (punitive awards should be "rational in light of their purpose to punish what has occurred and to deter its repetition"); Br. of Public Citizen 12 ("a punitive award that clearly exceeds any amount needed to further deterrence or retribution crosses the constitutional line").

II. Respondents' procedural attacks also miss the mark: plainly, the prejudicial and vague jury instructions, the lack of any trial-court review on the record, and the application by the court below of its "really mean"/"really stupid" test together resulted in a serious deprivation of TXO's procedural due process rights.

A. Aside from their frivolous waiver arguments,[33] respondents argue primarily that reversing the punitive award in this case on due process grounds would require States to guarantee appellate review in civil cases and to adopt particular, rigid procedures. *See* Resp. Br. 43-44 & n.52. TXO seeks no such result. In *Haslip*, this Court concluded that the jury instructions and two levels of careful review together provided procedural checks that ensured that "punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory dam-

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[33] On appeal to the West Virginia Supreme Court, TXO argued that "the factors considered by the jury and the trial judge . . . . do not meet the [*Garnes*] or *Haslip* standards and are not constitutionally permissible." W.V. App. Br. 48. The West Virginia court recognized that TXO's challenge was based on both procedural and substantive due process grounds. Pet. App. 35a. TXO's argument was thus both pressed and passed upon below, and is therefore properly before this Court. *United States* v. *Williams*, 112 S. Ct. 1735, 1738-39 (1992). That TXO's arguments in support of its properly presented due process challenge are not identical in some instances to those it made below does not alter this conclusion. It is well established that "[o]nce a federal claim is properly preserved, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532 (1992).

ages." 111 S. Ct. at 1045. Here, by contrast, the $10 million award was made pursuant to jury instructions that invited an arbitrary award, and then was subjected to no real review once the West Virginia Supreme Court declared that TXO had been "really mean." A determination that such a procedural vacuum is constitutionally inadequate would in no way interfere with any State's effort to implement a fundamentally fair punitive damages system.

B. Respondents defend the jury instructions by claiming that TXO received "more procedural protections" than were present in *Haslip*,[34] Resp. Br. 35, apparently assuming that due process requires an appellate court merely to tally the number of jury instructions and compare that number to the *Haslip* benchmark. As TXO discussed in its opening brief, while the jury here may have received more discrete bits of information than did the *Haslip* jury, the additional "information," far from properly guiding the jury's discretion, served only to stir passion and prejudice.[35]

Respondents portray TXO as urging that the wealth of a defendant can *never* be considered in the context of punitive damages, and they warn the Court against adopting such a "rigid constitutional rule." Resp. Br. 38. TXO advocates no such rule. Rather, TXO submits that

[34] The question whether the jury instructions comported with due process is plainly encompased within the question "[w]hether the award of punitive damages against [it] made in the absence of the procedural safeguards approved by this Court in [*Haslip*] violated TXO's procedural due process rights," Pet. i, and is therefore properly before this Court. Sup. Ct. R. 14.1(a).

[35] Respondents admit that phrases such as "'the character and degree of the wrong'" and a direction that punitive damages are "'entirely discretionary with the jury'" are "ambiguities" that can be "troubling." Resp. Br. 35 (quoting *Haslip*). Yet the jury below was instructed in functionally indistinguishable terms to award punitive damages as "additional compensation," to consider "the nature of the wrongdoing." J.A. 34, and was charged that it was "your decision, to either find punitive damages or not to find punitive damages." J.A. 41.

(1) consideration of wealth in this case did not rationally further West Virginia's stated policies, and (2) because the jurors were told that they should award some "additional compensation" and were also given numerical referents that related only to TXO's size, the jury naturally was led to act on passion and prejudice.[36]

Finally, the jury instructions did not, as respondents claim, confine the "additional compensation" component to an amount "needed to remedy injuries caused by TXO." Resp. Br. 41 n.47 (emphasis omitted); see J.A. 34. Plainly, if it had been so limited, then the award could not possibly have been even one dollar: the jury found *no injuries caused by TXO* other than respondents' attorneys' fees, for which a compensatory award of $19,000 was entered.[37]

C. It is also patent that the trial court conducted no careful, recorded review such as that approved in *Haslip*. The record of the post-verdict hearing includes only the lawyer's arguments; obviously, the trial judge's statement that he had "read everything," Pet. App. 56a,

[36] Respondents insist that the jury instructions confined the "wealth" evidence to a deterrence function. This is false. The jury was told that punitive damages had *two* functions: "to serve as an example or warning to others . . . and to provide additional compensation . . . ." J.A. 34. Thus, the jury had no reason to believe that the punitive award should serve *only* to deter. Particularly viewed in light of the instruction to award "additional compensation," the net worth evidence presented by respondents was the only guidance in calculating that bonus compensation.

[37] Denying that TXO's status as an out-of-state corporation could have affected the jury's calculation of the "additional compensation," respondents note that one of the parties adverse to TXO was itself a Texas corporation. Resp. Br. 41. This emphasis on Alliance Resources as the "principal litigant[]" in this case is misleading. West Virginia residents, Tug Fork, King, and Goode owned the oil and gas mineral interest and 85% of the royalty interest. *See* Pet. App. 8a. Moreover, an appeal to animus against an out-of-state corporation clearly was made at trial; counsel for respondents described TXO to the jury as "this greedy bunch from down in Texas," Tr. 773, and "Texas high rollers, wildcatters." Tr. 777.

was not reasoning that could later be reviewed. And the record contains not a shred of support for respondents' wishful claim that the trial court "revealed [as] the basis for its decision" that "TXO had embarked on a deliberate corporate scheme of land fraud and deception, which its highest officials knew to be wrong." Resp. Br. 42.[38]

D. Respondents also contend that the West Virginia Supreme Court's perfunctory review and its application of the "really mean"/"really stupid" test were adequate to satisfy due process. Respondents try to pass off the "really mean"/"really stupid" test as mere *dictum* and dramatic flourish. Resp. Br. 46 & n.57. They ignore that this test *has been applied* in a subsequent decision. See *Hinerman* v. *Daily Gazette Co.*, 423 S.E.2d 560 (W. Va. 1992). Finally, there is no suggestion in the court's discussion of its newly minted test that there is *any* constitutional limit to punitive awards against defendants deemed "really mean."[39]

The West Virginia Supreme Court did not scrutinize the jury instructions, nor did the record permit it to review the trial court's post-verdict decision. The

[38] Respondents also assert that the West Virginia Supreme Court's examination "cured" any error at the trial and post-trial levels. Resp. Br. 44. Even if that review had been "searching," respondents miss the point that in *Haslip*, this Court found important the *several layers* of protections provided in Alabama. At a minimum the jury must have been asked first to consider the same standards applied by the reviewing court. The appellate court focused principally on whether TXO was "really mean" or "really stupid," without any analysis of the procedure afforded TXO at the earlier stages. This review was too insubstantial to carry the procedural weight of multi-level review.

[39] The cases respondents cite to demonstrate that "[t]he West Virginia Supreme Court has proved itself more than willing to reduce or eliminate excessive damages" are unhelpful. Resp. Br. 46 n.55. In the first place, *not one* of those cases was reviewed under the "really mean"/"really stupid" test. And in five of the seven cases, the punitive awards were reversed entirely—and unremarkably—on the basis of insufficient evidence. Finally, one of the cases did not even involve punitive damages.

"comparative analysis" conducted by the West Virginia Supreme Court, see Resp. Br. 46 n.54, was not a comparison of prior awards *for similar conduct*, as approved in *Haslip*. Rather, the court surveyed post-*Haslip* punitive damages awards made for a wide variety of dissimilar conduct, including wrongful death, product liability, and bad-faith conduct by insurers. See Pet. App. 51a-52a. The result of this exercise was the "really mean"/"really stupid" standard. West Virginia thus abandoned the meaningful procedural scheme that, "following the dictates of *Haslip*," it had recently established.[40] *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991). Whereas in *Garnes* the court recognized that due process demands a "reasonable relationship . . . to the harm that has actually occurred . . . . [and to] compensatory damages," Pet. App. 33a-34a (quoting *Garnes*), the decision below established that any such inquiry ceases once the actor is pronounced "really mean."[41]

E. The core concerns of the vagueness doctrine are plainly raised by this case.[42] Although this Court found

[40] Even if limiting due process review with respect to *some* broad category of conduct were appropriate, the classification here is clearly arbitrary. Indeed, the court admitted that "it is sometimes difficult to distinguish between the mean cases and the stupid cases" at the appellate level. Pet. App. 36a n.11. And two concurring justices forcefully noted their concern over the lack of guidance provided by these terms. Pet. App. 53a-54a.

[41] TXO does not, as respondents claim, suggest here that West Virginia was required to apply its *Garnes* decision retroactively. Rather, TXO challenges the constitutional sufficiency of the procedure it did receive, just as it did in its appeal in West Virginia, W.V. App. Br. 47, and in its Petition for a Writ of Certiorari. Pet. 9-11.

[42] Respondents argue that TXO waived its vagueness argument, implicitly assuming that the vagueness doctrine embodies a constitutional principle separate from due process. But it is well established that the vagueness doctrine arises out of and expresses concerns inherent in the Due Process Clause. *See, e.g., Roberts* v. *United States Jaycees*, 468 U.S. 609, 629 (1984); Laurence H.

the vagueness doctrine "not helpful" in *Haslip*, 111 S. Ct. at 1046 n.12, the circumstances here compel the conclusion that TXO simply had no notice of the elements of a tort not previously recognized in West Virginia [43] or of the basis on which it could be assessed a punitive award of $10 million for its conduct. Even worse, respondents now urge this Court to uphold that enormous penalty on the basis of uncharged and unproven torts and crimes against which TXO never has had a chance to defend itself. If notice plays any role under the Due Process Clause, the jury verdict in this case must be set aside.

CONCLUSION

For the foregoing reasons, and those stated in TXO's opening brief, the judgment of the West Virginia Supreme Court of Appeals should be reversed.

Respectfully submitted,

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Counsel for Petitioner

March 23, 1993

* Counsel of Record

Tribe, *American Constitutional Law* 684 (2d ed. 1988). As discussed above, all procedural due process arguments were properly preserved. *See supra* note 33.

[43] Ignoring established slander of title law in other jurisdictions, the court found liability in the absence of any decline in property value, and permitted punitive damages without a finding of *actual malice*. *See* W.V. App. Br. 34. (Contrary to respondents' claims, attorney's fees constitute special damages only where the action in which they are incurred is the direct result of the influence of publication on third parties. Restatement (Second) of the Law of Torts § 633 at 359 (1977) (comment on clause (1)(b))).

APPENDICES

APPENDIX A

PLAINTIFF'S EXHIBIT NO. 4

SKEEN AND SKEEN
Attorneys and Counsellors at Law
216 Main Street
Ripley, West Virginia 25271-0066

July 12, 1985

Alliance Resources Corporation
N. Dallas Bank Tower
Suite 100
12900 Preston Road
Dallas, Texas 75230

Attention: Brian Robinson

Tug Fork Land Company
First National Bank Building
Welch, West Virginia 24801
Attention: D. S. Hardin

Gentlemen:

As counsel for TXO Production Corp. as well as the law firm who examined record title to the Tug Fork Land Company lease covering 1,002.74 acres in McDowell County, West Virginia, we have been requested to write you concerning the problem we have found as to the lessor's record title and what TXO intends to do as a result of this situation.

First, despite the fact that questions exist as to who owns the oil and gas under the subject lease and who is therefore entitled to the lessor's royalties, TXO has obtained leases, ratifications and/or quit claim deeds from all possible claimants so that TXO can proceed with its

drilling program on the tract and meet its drilling commitments to Alliance.

Second, the basic title problem encountered regards certain language in the mineral severance deed from Tug Fork Land Company to Leo J. Signaigo, Jr. dated September 2, 1958, recorded in McDowell County Deed Book 238 at page 562. A copy of this deed is enclosed with the relevant language underlined. In interpreting language such as this West Virginia Supreme Court decisions, especially *Jeffrey v. Spruce-Boone Coal Co.*, 112 W. Va. 360, 164 S.E. 292, 86 A.L.R. 966 (1932), and *Prindle v. Baker*, 116 W. Va. 48, 178 S.E. 513 (1935), indicate that title to the oil and gas passed to the grantee in the deed, and as a consequence when Leo J. Signaigo, Jr. then conveyed the minerals to Pocahontas Empire Coal Corporation, which changed its name to Hawley Coal Mining Corporation and then conveyed it to Virginia Crews Coal Company, using the same language, title to the oil and gas passed on to Virginia Crews Coal Company.

If this is the case Tug Fork Land Company would not own any of the oil and gas except that in the Pocahontas 3 and 4 seams and our present leasehold title fails. Because of this distinct possibility or probability, we made an objection and requirement in our report that no drilling could be commenced without Virginia Crews participation.

As a consequence TXO had to purchase a quit claim deed from Virginia Crews Coal Company for any oil and gas rights which Virginia Crews might have, and as a result now either Tug Fork Land Company or TXO is the owner of the oil and gas in place.

Third, in the event Tug Fork and TXO are not able to work out a mutually satisfactory settlement concerning this issue I have been instructed to prepare and file a suit in McDowell County seeking to clear cloud on title and for a declaratory judgment interpreting the language

of the deeds in question and determining present ownership of the oil and gas in question. Such a suit will in no way hinder TXO's drilling activities on this property, only the distribution of possible oil and gas revenues, if discovered and marketed.

Finally, should you have questions as to any of the above do not hesitate to contact me.

Very truly yours,

/s/ Larry L. Skeen
LARRY L. SKEEN

lls/md

encl.

cc: Doug Black
Trent Baulch
Richard H. Brumbaugh

APPENDIX B

PLAINTIFF'S EXHIBIT No. 11

TXO PRODUCTION CORP.
600 Charleston National Plaza
Charleston, West Virginia 25301

304/345-2610

August 15, 1985

Tug Fork Land Company
c/o McDowell County National Bank
Welch, West Virginia 24801

Grover C. Goode
First National Bank Building
Welch, West Virginia 24801

Alliance Resources Corporation
12900 Preston Road
North Dallas Bank, Suite 500
Dallas, Texas 75230

Gentlemen:

Arrangements were made with you to meet at our offices in Charleston earlier today to discuss title problems and our intentions regarding the exploration and development of the McDowell and Wyoming County oil and gas acreage which was assigned to us by Alliance.

Brian Robinson of Alliance (our assignor) attended the meeting, coming from his company's offices in Texas. Our own attorney, Trent Baulch, also flew in from Dallas for the meeting. After waiting for some period and telephoning to determine whether anyone else intended to appear we were advised by Grover Goode that there had been a change in plans and that he and Mr. Hardin were not coming to the meeting. For that reason we take this opportunity to advise you, in writing, of what we planned

to discuss at the meeting and what our intentions are concerning the oil and gas leaseholds in question.

As you are aware Tug Fork Land Company leased 1,002.74 acres in Browns Creek District and Sandy River District, McDowell County, West Virginia to George King by lease dated September 1, 1984, recorded in Deed Book 375 at page 716. This lease was assigned by George King and wife to Alliance Resource Company by assignment dated February 25, 1985, recorded in Deed Book 378 at page 420. In the deed Mr. King reserved a 1/16th overriding royalty and it is our understanding that this override is now shared equally with Mr. Goode who is the attorney for Tug Fork.

The Tug Fork lease, together with two other leases, was assigned to our company by Alliance Resources by assignment dated April 2, 1985, recorded in Deed Book 378 at page 413, and extended by letter agreement dated August 14, 1985.

Our agreement with Alliance provided for a payment of $31,794.80 to Alliance for the three leases (Tug Fork, Sudduth and Toler), which we made, and requires us to commence drilling two wells somewhere on the three assigned leases on or before October 1, 1985. The assignment and agreement further provides that in the event TXO's attorney determines that title has failed Alliance will reimburse TXO the consideration paid for any such lands upon which title is determined to have failed.

Our West Virginia attorneys who examined title to the Tug Fork, Toler and Sudduth leases, and who were also present for today's meeting, have encountered what may amount to a title failure or at least a serious defect regarding the Tug Fork lease but not as to the other two leases. Therefore we have a situation of a partial title failure which is limited solely to the Tug Fork lease. As soon as we were advised of the problem by our attorneys we advised you by letter and we have tried to keep you

advised and to work with you in resolving this problem in order that we might proceed to drill and thus carry out our assignments.

To reiterate briefly the problem stems from Tug Fork's September 2, 1958 deed to Leo J. Signaigo, Jr. in which Tug Fork conveyed to Mr. Signaigo "all the coal *and other minerals and mineral substances* in, on and underlying" the subject 1,002.74 acres (Emphasis added). Our legal research indicates the West Virginia Supreme Court has held that such language of itself in a deed grants title to the oil and gas in place as well as to the coal.

The only reservation or exception in the deed of any relevance concerning the oil and gas is 2.(a) which states:

> "There is excepted and reserved from the operation of this deed: (a) all the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described."

Our legal counsel informs us that in applying accepted general rules of construction to this language, the reservation of oil and gas is probably limited to any oil and gas found in the Pocahontas No. 3 and No. 4 seams of coal and not to any other oil and gas under the subject land. This position seems borne out at least to some extent by the fact that after the deed was recorded Tug Fork never had itself assessed for and never paid taxes upon the oil and gas under the acreage but that instead Mr. Signaigo and his successors in title were assessed for and have in fact been paying the taxes on the oil and gas under the 1,002.74 acres.

Since the time of that deed Mr. Signaigo has made a similar conveyance of the coal and other minerals with similar language to Empire Coal and Land Corporation by deed dated April 11, 1961, recorded in Deed Book 247 at page 500, and Hawley Coal Corporation (Empire

changed its name) conveyed the coal, oil, gas and other minerals to Virginia Crews Coal Company by deed dated July 21, 1983, recorded in Deed Book 370 at page 59.

Believing under the above circumstances, on the advice of our counsel, that the record owner of the oil and gas under the 1,002.74 acres could possibly or even probably be Virginia Crews instead of Tug Fork, we contacted Virginia Crews and were informed they required $10.00 per acre for a quit claim deed for the oil and gas in question, but we were finally able to settle on a price of $6,000.00, which TXO paid in exchange for a quit claim deed.

The $6,000.00 payment together with our other costs and expenses attendant to clearing this title problem on the Tug Fork lease now approximate $15,000-$20,000, not to mention the pro-rata share of the $31,794.80 which was paid to Alliance for the Tug Fork lease. Due to this situation, and in our attempt to reach some amicable settlement, and further in order to avoid what our attorneys advise could require as much as $10,000.00 in additional legal fees if suit is required to resolve this problem, we called today's meeting at our offices which you agreed to attend, but did not.

This leaves us with little alternative but to proceed as best we can to live up to our agreement with Alliance while at the same time attempting to protect our considerable investment in the Tug Fork lease. We want and intend to drill two proposed wells in the very near future, one on the Tug Fork lease and one on the Sudduth lease. However, Mr. Goode informed us today he plans to sue us for damages and raises a West Virginia statute which he says precludes us from questioning our lessor's title. If Mr. Goode is referring to the Attornment Statute, W. Va. Code Chapter 37, Article 6, Section 4 (which we think he is), he is mistaken. Mr. Goode should read *Shearer v. Allegheny Land & Mineral Co.*, 152 W. Va. 616, 165 S.E.2d 369 (1968),

and he will find that in order for that statute to apply a landlord-tenant relationship has to exist but there is no such relationship regarding undeveloped oil and gas leases. The facts of this decision are almost exactly in point with those in our case as there the lessee found out while drilling a well that someone other than its lessor claimed title to the oil and gas under the lease. The lessee then obtained an assignment from the other party claiming title and was later sued by the earlier lessor. The Supreme Court held the attornment statute did not apply and the lessee did only what was right under the circumstances, which is what we are trying to do regarding the present title problem.

We discussed this matter with Brian Robinson while he was at our office earlier today and unless we are legally prevented from doing so we intend to proceed with the drilling of the two wells as planned. However, being offered no assistance or credit for our expenses, we have no recourse but to hold any title we obtained under the quit claim deed from Virginia Crews, and we will be filing a declatory (sic) judgment action in McDowell County naming Tug Fork and Alliance as parties defendant (along with George King and Grover Goode due to your overrides) seeking a court determination and interpretation of the deeds and the ownership of the oil and gas in question. We also intend to seek alternative relief for reimbursement of our expenses to date occasioned by the title problem and pro rata reimbursement of the signing bonus.

Should the court confirm Tug Fork's title to such oil and gas and not our own through the quit claim deed from Virginia Crews, we will continue operating the lease as Alliance's assignee and paying the prescribed royalties to Alliance, King and Goode in accordance with the assignments and overrides on the Tug Fork lease.

In the event you change your minds and wish to discuss this matter or have any questions please do not hesi-

tate to contact us. We believe the declaratory judgment action is the least expensive and most expeditious method to resolve this problem and we hope you take no offense at such a proceeding as we are simply trying to protect our mutual interests and be able to proceed with the drilling program as scheduled despite the possible title failure of the Tug Fork lease. However, please be advised that if Mr. Goode does sue us as he has stated we will pursue all of our legal rights against such a suit and those involved as our intent throughout this matter is not to avoid any of our legal responsibilities but instead to resolve and correct title problems which were created long before we came into the picture which should have been detected and resolved years ago as inexpensively and expeditiously as possible.

Very truly yours,

TXO PRODUCTION CORP.

/s/ D. Michael Good
D. MICHAEL GOOD
Vice President

/tr

cc Larry Skeen
Trent Baulch
Richard H. Brumbaugh
George King

APPENDIX C

PLAINTIFF'S EXHIBIT NO. 3

SKEEN AND SKEEN
Attorneys and Counsellors at Law
216 Main Street
Ripley, West Virginia 25271

May 15, 1985

TXO Production Corp.
900 Charleston National Plaza
Charleston, West Virginia 25301

Attention: Michael Blumn

Gentlemen:

PRELIMINARY TITLE OPINION

RE: Oil and gas lease dated the 1st day of September, 1984 from Tug Fork Land Company, a West Virginia corporation, to George King on 1,002.74 acres, more or less, Browns Creek District, McDowell County, West Virginia, for a primary term of three (3) years.

DOCUMENTS EXAMINED

All records contained in the offices of the Clerk of the County Commission, Clerk of the Circuit Court, Assessor and Sheriff of McDowell County, West Virginia which pertain to the subject real estate, certified from November 10, 1858 to May 10, 1985 at 10:00 o'clock a.m.

TITLE TO LAND

Subject to the comments and requirements hereinafter set forth:

Surface:

The major portion of the surface is owned by J. A. Blevins, et al., subject, however, to approximately sixteen outsales of parcels ranging from 5 acres in size to small lots 100′ x 110′. Your abstractor has deed reference information and if you so instruct will obtain descriptions and/or title ownership records.

Minerals:

All the coal and other minerals and mineral substances in Virginia Crews Coal Company, a West Virginia corporation.

Royalty:

Virginia Crews Coal Company, a corporation.

Oil and Gas Leasehold:

No active lease of record.
(See Objections and Requirements.)

HISTORY OF TITLE

NOTE: The records contain two chains of title. The first 16 entries of this History of Title are devoted to instruments that were found by the court to be false and fraudulent chains of ownership.

The original patents for 320,000 acres and 480,000 acres were granted unto Robert Morris (a signer of the Declaration of Independence and the Constitution) by the Governor of the Commonwealth of Virginia by patent dated the 23rd day of March, 1795, originally recorded in Tazewell County, Virginia. An outconveyance of 50,000 acres re-

duced the acreage by computation to 750,000 acres; however, Henry B. Harman surveyed the balance and determined that in actuality the boundaries contained only 157,750 acres.

1. By deed dated November 10, 1858, Michael *Bovier* and *Louwesa Bovier*, his wife, purportedly conveyed a 480,000 acre tract of land and a 320,000 acre tract of land to John Herman. This deed was recorded in Deed Book 3 at page 247 originally, now changed to page 266 on the 24th day of May, 1877.

NOTE: The deeds in the false chain of title list the surname Bouvier and Louisa with numerous spellings. This deed affords little, if any, conflict by legal standards to our chain of title which emanates by virtue of the deed from M. Bouvier to Richard Warren in view of subsequent recordation in Tazewell County, Virginia in Deed Book 10 at page 630.

2. By deed dated the 7th day of July, 1865, Michael *Bowvier* and Louisia C. *Bowvier*, his wife, purportedly conveyed 36,750 acres to Johnathan Patterson, Jr., Richard C. Ridgeway and William Bonton. This deed was originally recorded in Deed Book 1 at page 300, now 298.

NOTE: These early deed books have been retyped at some point in time and page numbers have been changed. In addition, the very distinct possibility exists that typing and clerical errors have occurred, especially in view of the early styled penmanship that makes reading difficult at times. This deed does not refer to prior deed of transfer. It has no recordation date. The deed that precludes it was recorded on the 4th day of September, 1869. The deed that follows was recorded on the 12th day of December, 1869.

The conveyance of 36,750 acres was purportedly made pursuant to an agreement and could have represented the balance of the computed acreage that was supposed to exist after Bouvier outconveyances.

This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

3. By deed dated the 15th day of February, 1876, Morgan H. Haskins (marital status unknown) purportedly conveyed a 320,000 acre tract of land to Edward Driscoll. This deed was originally recorded in Deed Book 3 at page 211, now 229, on the 15th day of March, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

4. By deed dated the 5th day of September, 1876, Edward Driscoll and Helen K. Driscoll, his wife, purportedly conveyed a 40,960 acre tract of land (part of the 320,000 acre patent) to Ferdinand William Hermann as Trustee. This deed was originally recorded in Deed Book 3 at page 214, now 232, on the 15th day of March, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

5. By deed dated the 20th day of February, 1877, Edward Driscoll and Helen Driscoll, his wife, purportedly conveyed a part of the 320,000 acre tract (40,960 acres) to Ferdinand William Hermann, Trustee. This deed was originally recorded in Deed Book 3 at page 216, now 233, on the 15th day of March, 1877.

6. By deed dated the 21st day of February, 1866, Michael Bouvier (marital status unknown) purportedly conveyed the 320,000 acre tract of land and the 480,000 acre tract of land to Henry S. Morris. This deed was

originally recorded in Deed Book 3 at page 284, now 301, on the 24th day of August, 1877.

NOTE: Pursuant to court proceedings held in 1879, this deed was cancelled as being fraudulent and made null and void. A second proceeding held in 1883 reinstated the deed. The final decision in 1884 once again set the deed aside as being fraudulent and forged.

7. By deed dated the 10th day of November, 1858, Michael *Bovier* and *Louwesa Bovier*, his wife, Thomas Beck (widower) and David S. Hollister (marital status unknown) purportedly conveyed the 480,000 acre tract and the 320,000 acre tract of land to John Herman. This deed was originally recorded in Deed Book 3 at page 247, now 266, on the 24th day of May, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and dates.

8. By deed dated the 11th day of July, 1877, Ferdinand William Hermann, Trustee, purportedly conveyed an interest in the 320,000 acre tract of land to Albert Karntz. This deed was originally recorded in Deed Book 3 at page 288, now 306, on the 24th day of August, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

9. By deed dated the 11th day of July, 1877, Ferdinand William Hermann, Trustee, purportedly conveyed an interest in the 320,000 acre tract of land to Henry Woellner. This deed was originally recorded in Deed Book 3 at page 292, now 310, on the 24th day of August, 1877.

10. By deed dated the 16th day of July, 1876, Morgan H. Haskins (marital status unknown) purportedly conveyed his interests in the 320,000 acre tract of land to Smith L. Bellows. This deed was originally recorded in

Deed Book 3 at page 373, now 382, on the 5th day of December, 1877.

11. By deed dated the 29th day of October, 1878, Morgan H. Haskins (marital status unknown) purportedly conveyed a 580,000 acre tract of land to Harrison Hoyt. This deed was originally recorded in Deed Book 4 at page 22, now 11, and has no date of recordation.

NOTE: The preceding deed has no date of recordation, but the following deed was recorded on the 12th day of March, 1879.

This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

12. By deed dated the 9th day of January, 1878, Ferdinand William Hermann and Vitula Hermann, his wife, purportedly conveyed a 3,840 acre tract of land to Mary Jane Akerman. This deed was originally recorded in Deed Book 4 at page 36, now 22, and has no recordation date. The deed that immediately precedes this deed was recorded on the 12th day of April 1879.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

13. By deed dated the 8th day of September, 1871, Morgan H. Haskins (marital status unknown) purportedly conveyed a 320,000 acre tract of land to Harris Hoyt. This deed was originally recorded in Deed Book 4 at page 60, how 39, on the 16th day of May, 1879.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

14. Mary L. Sacia, et al., as plaintiffs, caused to be originally recorded in Deed Book 4 at page 111, now 73, a Notice of Lis Pendens on the 28th day of August, 1879,

that was executed on the 22nd day of July, 1879. The announced purpose of the court action was to set aside forged deeds.

15. By deed dated the 25th day of August, 1879, Harris Hoyt and Marie E. Hoyt, his wife, purportedly conveyed the 480,000 acre tract of land to Henry W. Adams. The deed was recorded in Deed Book at page 105 on the 10th day of October, 1879.

NOTE: Chancery Order Book 1 at page 301, contains an order reflecting the court's action in respect to the setting of this deed and others aside as based upon fraudulent and forged documents of title.

16. On the 8th day of July, 1884, the Circuit Judge of McDowell County, West Virginia caused to be recorded a decree that was rendered by said Court at the April term in 1884. Apparently the cases that were pending had been joined and were styled S. G. B. Cook, et al. vs. Mary L. Sacia, et al. and the case addressed the adverse claims of title that arose as a result of the numerous deeds of record that were in conflict. The Court decreed that the deed from Bouvier to Morris (see entry 6) dated April 21, 1866 "was not genuine, but a forgery". The Court reasoned that Bouvier had conveyed away the lands "long years before" and the grantee had constructive notice of the conveyances. The Court found that:

> ". . . the said deed of 21st of February, 1866 purporting to have been made by Michael Bouvier to Henry S. Morris and all other deeds and conveyances to parties claiming under, by or through the said deed are hereby declared void."
>
> ". . . the said Iaeger, Simpson, Warren's heirs and others claiming under the deeds and title of Bouvier made pursuant to the agreement of 7th day of December, 1850 be and are hereby declared valid and subsisting title".

NOTE: The deed on which we base our chain of title was declared valid and subsisting title and emanates from Richard Warren. The records in all probability contained other deeds which your abstractor could not locate due to title springing from nowhere and the additional problem that resulted from changing page numbers; however, I am satisfied that any adverse claims that would affect title that emanates from Richard Warren prior to 1884 were resolved by the above decision.

ACTUAL HISTORY OF TITLE

17. By deed dated the 7th day of July, 1985, Richard Warren and Susan B. Warren, his wife, conveyed an undivided one-half (1/2) of one-tenth (1/10) of 800,000 acres less 50,000 acres (15,750 acres) to Lessack H. Simpson. This deed was recorded in Deed Book 1 at page 174 on the 9th day of July, 186/.

18. By deed dated the 30th day of May, 1872, Lessack H. Simpson and Catherine Simpson, his wife, conveyed an undivided one-half (1/2) of fifteen-one-hundred fiftieths (15/150) of the 15,750 acres to Solomon L. Simpson. This deed was originially recorded in Deed Book 2 at page 179, now 161, on the 12th day of June, 1872.

19. By will dated the 29th day of March, 1877, Lissack H. Simpson gave powers to dispose of his estate to Solomon L. Simpson and Naphtali Simpson as Executors of his said estate, the proceeds to be divided among his heirs as provided in said will. This will was recorded in Will Book 2 at page 12 on the 6th day of January, 1909.

20. By quit-claim deed dated the 27th day of February, 1875, Solomon L. Simpson (marital status unknown) conveyed all of his right, title and interest in one-half

(1/2) of his undivided interest to Victory L. Simpson. This deed was originally recorded in Deed Book 3 at page 97, now 110, on the 24th day of February, 1876.

21. By deed dated the 1st day of January 1876, Solomon L. Simpson (marital status unknown) conveyed all of his right, title and interest in an undivided one-half (1/2) of 15,750 acres to Frederick Lewis. This deed was originally recorded in Deed Book 3 at page 98, now 111, on the 24th day of February, 1876.

NOTE: This deed was given in connection with an assignment in trust to aid in the execution of said assignment.

22. By deed dated the 25th day of September, 1876, Frederick Lewis as an assignee of the estate of Solomon L. Simpson conveyed all of his right, title and interest in an undivided one-half (1/2) of the 15,750 acre tract to Victoria L. Simpson. This deed was originally recorded in Deed Book 3 at page 172, now 180, on the 16th day of October, 1876.

23. By will dated the 20th day of June, 1873, Richard Warren devised unto his wife one-half (1/2) of all lands and devised the other one-half (1/2) of all lands to the children of his first wife "who shall be living at my death equally". This Last Will and Testament was originally recorded in Deed Book 4 at page 5, now 1, on the 15th day of January, 1879.

NOTE: This is an extremely lengthy will with three (3) codicils. I have determined from the records that the children of Richard Warren and his first wife were Henry Warren, Emma Warren and Angelina Warren.

24. By quit-claim deed dated the 11th day of February, 1882, Victoria Simpson and Solomon L. Simpson, her husband, conveyed an undivided one-sixth (1/6) of the 15,750 acre tract to Solomon L. Simpson and Naphtali L. Simpson as Executors of the Will of Lissack H. Simpson. This deed was recorded in Deed Book 6 at page 271 on the 14th day of May, 1883.

25. By deed dated the 25th day of May, 1885, Susan Warren, wife of Richard, now widowed, conveyed an undivided one-fourth (1/4) of the 15,750 acres that was devised to her by her husband, Richard, to Solomon L. Simpson. This deed was recorded in Deed Book 7 at page 558 on the 22nd day of July, 1885.

26. By deed dated the 26th day of May, 1885, Solomon L. Simpson as sole surviving Executor of the Will of Lissack H. Simpson, conveyed an undivided one-half (1/2) of the 15,570 acre tract to Garrett S. Mott and James G. Smith. This deed was recorded in Deed Book 7 at page 551 on the 21st day of July, 1885.

NOTE: This undivided interest was a part of the interests acquired from Warren in Deed Book 6 at page 135.

27. By deed dated the 12th day of September, 1885, Henry Warren and Alice A. Warren, his wife, and Paul Guerra and Emma G. Guerra, his wife, and Sigismund G. Nonne and Angelina L. Nonne, his wife, conveyed an undivided one-fourth (1/4) of the 15,570 acre tract to Solomon L. Simpson. This deed was recorded in Deed Book 9 at page 25 on the 3rd day of December, 1886.

NOTE: The grantors are the children of Richard Warren and his first wife, who survived Richard, together with his second wife, Susan B. Warren.

28. By deed dated the 5th day of January, 1886, Solomon L. Simpson conveyed a one-fifty-fith (1/55) part of 800,000 acres less 50,000 acres, finally surveyed by Hermann as 15,750 acres, to Alfred L. Simpson. This deed was recorded in Deed Book 8 at page 398 on the 4th day of January, 1886.

NOTE: There appears to have been a clerical error in that the dates indicate recordation prior to execution.

29. By deed dated the 1st day of July, 1887, Alfred L. Simpson (marital status unknown) conveyed all of his right, title and interest in the subject acreage to Solomon L. Simpson. This deed was recorded in Deed Book 9 at page 27 on the 9th day of September, 1887.

NOTE: This deed had no notarial seal affixed or indicated and was executed outside of the boundaries of the State of West Virginia.

30. By deed dated the 1st day of July, 1887, Alfred L. Simpson (marital status unknown) conveyed all of his right, title and interest in the subject acreage to Solomon L. Simpson. This deed was recorded in Deed Book 9 at page 27 on the 9th day of September, 1887.

NOTE: This deed is the same as set out in entry 29 (see above) and had a notarial seal affixed thereto.

31. By deed dated the 9th day of August, 1887, Garrett S. Mott and Hannah A. Mott, his wife, and James D. Smith and Harriet L. Smith, his wife, conveyed all of their right, title and interest in the subject acreage back to Solomon L. Simpson, subject to claims that were junior in nature. This deed was recorded in Deed Book 9 at page 73 on the 9th day of September, 1887.

NOTE: At this point in time Solomon L. Simpson had consolidated all of the outstanding undivided interests and apparently had satisfied the requirements of Henry McCormick, who on the same date became the purchaser of the 15.750 acres (see next entry).

32. By deed dated the 9th day of August, 1887, Solomon L. Simpson and Victoria Simpson, his wife, conveyed

the 15,750 square acres, more or less, to Henry McCormick. This deed was recorded in Deed Book 9 at page 75 on the 13th day of September, 1887.

NOTE: This deed contained extensive back references to deeds, patents, etc. and subjected the conveyance to such junior claims that might exist and errors in survey, etc. This area was fraught with adverse claims of squatters, holders of junior patents, fraudulent deeds, etc. and the grantee took upon himself the burden of removing same, if they existed. The owners to this point in time were all residents of other states and countries.

33. By will dated the 3rd day of March, 1894 (last codicil), Henry McCormick of Harrisburg, Pennsylvania made certain specific bequests and placed the remainder of his large estate, including the subject acreage, in trust to be divided equally among his named heirs to Henry B. McCormick and Vance C. McCormick as Trustees, together with the necessary power to dispose of the same. This will, together with the two codicils, was recorded in Will Book 1 at page 103 on the 20th day of May, 1901.

34. By deed dated the 3rd day of March, 1902, Henry B. McCormick and Vance McCormick, as Trustees, conveyed a 7.64 acre tract of land and a 381.1 acre tract of land to Hensley Land Company, a corporation. This deed was recorded in Deed Book 30 at page 353 on the 31st day of March, 1902.

NOTE: Your abstractor found no record of the recordation of a certificate of incorporation for Hensley Land Company. A vendor's lien was retained by the grantors but was released in Release Book 2 at page 103.

35. By agreement dated the 3rd day of October, 1900, Henry B. McCormick and Mary Boyd McCormick, his wife, and Vance McCormick (marital status unknown)

and Anne McCormick (marital status unknown) entered into an agreement to hold and operate the trust and to divest at a later date. This agreement contained the terms of the operation of the estate and was quite extensive. This agreement was recorded in Deed Book 30 at page 346 on the 31st day of March, 1902.

36. By deed dated the 28th day of June, 1915, Hensley Land Company, a corporation, conveyed the 7.64 acre tract of land to Maude A. Rucker (33/50), Margaret C. Rucker (1/50) and W. W. Hughes (16/50). This deed was recorded in Deed Book 69 at page 97 on the 17th day of July, 1915.

NOTE: Recitations in this deed advise that the affairs of the corporation were being wound up and that this was a division of these lands that were assets of the corporation in the same proportions as the shareholders' interests indicate.

37. By deed dated the 20th day of December, 1920, Maude A. Rucker (widow) and Margaret Rucker Shannon and E. Robert Shannon, her husband, and W. W. Hughes and Rose N. Hughes, his wife, conveyed the 7.64 acre tract of land to Welch Pocahontas Land Company. This deed was recorded in Deed Book 85 at page 316 on the 20th day of December, 1920.

38. By deed dated the 9th day of July, 1920, Henry B. McCormick and Vance C. McCormick, as Trustees, conveyed a 455 acre tract of land to Welch Pocahontas Land Company. This deed was recorded on the 30th day of July, 1920 in Deed Book 83 at page 454.

NOTE: Your abstractor did not find a recorded certificate of incorporation for Welch Pocahontas Land Company. This deed contained a reservation of rights of way to Norfolk and Western Railway Co.

39. By deed dated the 19th day of January, 1921, Henry B. McCormick and Vance C. McCormick, as Trustees, conveyed a tract of land containing 547.7 acres to Welch Pocahontas Land Company, a corporation. This deed was recorded in Deed Book 85 at page 399 on the 19th day of January, 1921.

NOTE: At this point in time the three tracts of land which comprise the acreage that is the subject of this report were vested in Welch Pocahontas Land Company.

40. By deed dated the 18th day of August, 1926, Welch Pocahontas Land Company and Wise Pocahontas Coal Company, a corporation, conveyed the 547.7 acre tract, the 455 acre tract and the 7.64 acre tract to Westchester Pocahontas Collieries Company. This deed was recorded in Deed Book 106 at page 99 on the 18th day of August 1926.

NOTE: Welch Pocahontas Land Company had granted a thirty year coal lease on the subject acreage to Wise Pocahontas Coal Company (see lease section) and Wise joined in as a grantor for the purpose of conveying its interests in the coal lease. In addition, by assignment recorded in Deed Book 106 at page 102, A. H. Bouchard and Lydia Bouchard, his wife, had assigned all of the rights that he had acquired from Welch Pocahontas Land Company and Wise Pocahontas Coal Company properties in an unrecorded option to purchase dated July 16, 1926, to Westchester Pocahontas Collieries Company in another unrecorded instrument.

No record of certificate of incorporation for Wise Pocahontas Coal Company or Westchester Pocahontas Collieries Company was found.

41. By an instrument dated the 16th day of August, 1926, Westchester Pocahontas Collieries Company, a cor-

poration, agreed to execute a deed of trust and issue $165,000.00 worth of bonds. This instrument was recorded in Deed of Trust Book 25 at page 86 on the 18th day of August, 1926.

42. By deed of trust dated the 15th day of March, 1927, *Westchester-Pocahontas* Collieries Company conveyed the subject acreage (547.7 acres, 455 acres and 7.64 acres) in trust to E. S. Thompson and Graham Sale as Trustees to secure the McDowell County National Bank in the amount of $300,000.00 for a bond issue. This instrument was recorded on the 2nd day of August, 1927 in Deed of Trust Book 27 at page 28.

NOTE: An additional deed of trust (in reality a chattel mortgage) involving these same parties was recorded in Deed of Trust Book 26 at page 137. A default occurred and the Trustees were forced to sell (see next entry).

43. By deed dated the 7th day of March, 1930, E. S. Thompson and Graham Sale, as Trustees conveyed the 1,010.34 acres to R. L. Page. This deed was recorded in Deed Book 117 at page 124 on the 13th day of September, 1930.

44. By deed dated the 13th day of June, 1930, R. L. Page and Atta P. Page, his wife, conveyed the 1,010.34 acres to Famous Pocahontas Coal Company. This deed was recorded in Deed Book 117 at page 128 on the 13th day of September, 1930.

NOTE: No recordation of certificate of incorporation was found for Famous Pocahontas Coal Company.

45. By deed dated the 12th day of June, 1935, Henry B. McCormick and Vance C. McCormick, as Trustees, executed a deed designed to divest the trust created earlier (see entries 34 and 35) and conveyed the corpus to Anna McCormick, Henry B. McCormick and Vance C.

McCormick, as individuals. This deed was recorded in Deed Book 130 at page 36 on the 25th day of June, 1935.

NOTE: Attached to this deed your abstractor found the copies of the agreements entered into on October 3, 1990 and a supplement to the agreement dated January 31, 1901. These instruments were apparently recorded to divest the trust of other properties it retained; however, the inclusion of the agreements made clear the authority of the Trustees.

46. *Outsale.* By deed dated the 19th day of December, 1938, Famous Pocahontas Coal Company conveyed a 7.6 acre tract of land to S. M. Burgess; a third party, Frank Beamer, joined in said deed to quit-claim his interest, if any, in said acreage. This deed was recorded in Deed Book 141 at page 103 on the 19th day of December, 1938.

NOTE: The grantors retained a vendor's lien which was released in Release Book 18 at page 242. The grantor retained a right of way 30 feet in width for the purpose of ingress and egress to the lands it retained. There was no reservation of oil, gas or minerals.

47. *Outsale.* By deed dated the 15th day of April, 1940, Famous Pocahontas Coal Company conveyed a 50 acre tract of land to Mrs. Cora Lee Smith. This deed was recorded in Deed Book 159 at page 288 on the 27th day of March, 1944.

NOTE: The grantor reserved all of the oil, gas and minerals underlying the subject acreage. This tract was a part of the 547.7 acre tract of land. The grantor retained a vendor's lien which was released in Release Book 23 at page 454.

48. By deed dated the 14th day of March, 1945, Famous Pocahontas Coal Company conveyed the subject acreage to Roderfield Realty Company. This deed was

recorded in Deed Book 162 at page 459 on the 14th day of March, 1945.

NOTE: The Certificate of Incorporation for Roderfield Realty Company is recorded in Record of Incorporation Book 1 at page 363. This certificate provides for automatic expiration fifty years after March 12, 1930.

49. By deed dated the 29th day of October, 1945, Roderfield Realty Company conveyed the surface only of the 1,002.74 acre tract to J. A. Blevins. This deed was recorded in Deed Book 165 at page 420 on the 29th day of October, 1945.

NOTE: Severance of minerals takes place at this point in time. The records in the office of the Assessor indicate that J. A. Blevins has made at least seven outconveyances of surface ranging in size from five acres to 100′ x 110′ lots. The larger tracts have been subdivided into smaller parcels. Your abstractor gathered information that will assist your landman in locating these parcels. Should you desire certification of ownership of the surface lots, please advise.

50. By deed dated the 16th day of May, 1958, Roderfield Realty Company conveyed:

> ". . . all of its real property, including, but not limited to, fee, surface and mineral, of all kinds and descriptions, now owned by it, including its lands, and interests in lands, and all property rights and privileges appurtenant thereto, situate in McDowell County, West Virginia, and any other lands or interest in lands wherever situate,"

to Tug Fork Land Company, a corporation. This deed was recorded in Deed Book 237 at page 518 on the 30th day of June, 1958.

NOTE: Record of Incorporation Book 4 at page 452 contains a certificate of dissolution granted on the 20th day of March, 1958, two months before the above deed was executed; however, it is the opinion of your abstractor that authority existed for the execution of this deed as a part of the winding down process.

This deed was made subject to an oil and gas lease to United Fuel Gas Company, an oil and gas lease to Hope Natural Gas Company and a lease of surface only to J. B. Crozier for use as a siding.

The certificate of incorporation for Tug Fork Land Company is recorded in Record of Incorporation Book 4 at page 460.

51. By deed dated the 2nd day of September, 1958, TUG FORK LAND COMPANY, a corporation, conveyed "all the coal and other minerals and mineral substances in, on and underlying" the 1,002.74 acres to Leo J. Signaigo, Jr., subject to certain specified reservations and exceptions, including a reservation of "All the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described." This deed was recorded in Deed Book 238 at page 562 on the 20th day of September 1958.

NOTE: This instrument and the provisions contained therein, together with other indicia of ownership such as the taxation of the coal and other minerals, in the opinion of your abstractor, is a conveyance of the oil and gas underlying the subject acreage. Attached hereto you will find a copy of the deed and a copy of the memorandum of opinion written by Larry L. Skeen which contains further information. The land books of the Assessor contain no entries for Tug Fork Land Com-

pany and Tug Fork paid no taxes on the oil and gas. However, the grantee, Leo J. Signaigo, Jr., was taxed from 1959 to 1961 with 1,002.74 acres on Hensley Creek for minerals or timber and those corporate entities that follow him in the chain of title have paid to the present (see the Encumbrances section of this report, subheading *Taxes*).

United Fuel Gas Co. obtained a lease from Roderfield Realty Co. in 1956 and in 1960 they obtained an extension of the lease from Tug Fork Land Company (see Lease section of this report) and drilled upon the subject acreage. It seems evident that since United Fuel drilled after September of 1958 they did not reach the same conclusion as to oil and gas ownership as we have, since your abstractor could find no record of a lease from Leo J. Signaigo, Jr. or his assigns to United Fuel. United Fuel released their lease in 1966.

52. By deed dated the 11th day of April, 1961, Leo J. Signaigo, Jr. (marital status unknown) conveyed all the coal and other minerals and mineral substances underlying the 1,002.74 acre tract of land to Empire Coal and Land Corporation. This deed was recorded in Deed Book 247 at page 500.

NOTE: Your abstractor found no record of the recordation of a certificate of incorporation for Empire Coal and Land Corporation; however, Record of Incorporation Book 6 at page 289 contains a Certificate of Ownership and Merger wherein eight (8) companies and/or corporations including Empire Coal and Land Corporation were merged into Pocahontas Empire Coal Corporation on December 31, 1969. The Certificate of Incorporation for

Pocahontas Empire Coal Corporation is recorded in Record of Incorporation Book 4 at page 282.

53. By an instrument dated the 8th day of September, 1978, Leo J. Signaigo, Jr. (marital status unknown) released his first option to purchase the coal in Seams #3 and #4 as granted in Deed Book 238 at page 566.

54. Record of Incorporation Book 6 at page 295 contains a Certificate of Change of Corporate Name from Pocahontas Empire Coal Corporation to Hawley Coal Mining Corporation dated February 2, 1970, and recorded on February 24, 1970.

55. By deed dated the 21st day of July, 1983, Hawley Coal Mining Corporation conveyed all the coal and other minerals and mineral substances underlying the subject acreage (1,002.74 acres) to Virginia Crews Coal Company, a corporation. This deed was recorded in Deed Book 370 at page 59 on the 2nd day of August, 1983.

NOTE: Your abstractor found no record of the recordation of a Certificate of Incorporation for Virginia Crews Coal Company.

OIL AND GAS LEASES

1. By oil and gas lease dated the 17th day of December, 1942, Famous Pocahontas Coal Company leased the subject acreage to Hope Natural Gas Company for a primary term of ten (10) years or duration of production. This lease was recorded in Deed Book 156 at page 133 on the 4th day of December, 1943.

NOTE: This lease has expired by its own terms unless a well was drilled during its primary term and production is still taking place (see attached copy).

2. By oil and gas lease dated the 28th day of February, 1952, Roderfield Realty Company leased the subject

acreage to Hope Natural Gas Company for a primary term of five (5) years or duration of production. This lease was recorded in Deed Book 200 at page 114 on the 13th day of April, 1952.

NOTE: By release dated August 27, 1952 and recorded in Deed Book 202 at page 480 on the 11th day of September, 1952, Hope Natural Gas Company surrendered the above lease.

3. By oil and gas lease dated the 8th day of October, 1956, *Roderfield Realty Co., Inc.* leased the subject acreage to United Fuel Gas Company for a primary term of five (5) years or duration of production. This lease was recorded in Deed Book 227 at page 412.

4. By oil and gas lease dated the 27th day of September, 1960, Tug Fork Land Company leased the subject acreage to United Fuel Gas Company by obtaining a five year extension of the above lease from Roderfield beginning October 8, 1961.

NOTE: United Fuel Gas Company released the original lease from Roderfield and extension from Tug Fork by release dated the 28th day of January, 1966 and recorded in Deed Book 265 at page 242 on the 9th day of February, 1966.

5. By oil and gas lease dated the 8th day of September, 1981, Tug Fork Land Company leased the subject acreage to Georgia Fuels Company for a primary term of two (2) years or duration of production. This lease was recorded in Deed Book 361 at page 439 on the 18th day of September, 1981.

6. By oil and gas lease dated the 1st day of September 1981, Tug Fork Land Company leased the subject acreage to Georgia Fuels for a primary term of two (2) years or duration of production. This lease was recorded in Deed Book 366 at page 369 on the 29th day of September, 1982.

NOTE: This lease superseded the lease executed on September 8, 1981 and has expired by its own terms unless production took place during its primary term. The records reflect the fact that the President of Georgia Fuels was George King, in all probability the same George King to whom Tug Fork next leased the land. This lease has not been released (see attached copy).

7. By oil and gas lease dated the 1st day of September, 1984, Tug Fork Land Company leased the subject acreage to George King for a primary term of three (3) years or duration of production. This lease was recorded in Deed Book 375 at page 716 on the 27th day of September, 1984.

NOTE: This lease has not been released (see attached copy) and is the subject of this report.

ENCUMBRANCES

MORTGAGES & JUDGMENTS:

1. By Notice of Business and Occupation Tax Lien dated April 16, 1984, and recorded in Judgment Lien Docket Book 20 at page 288, the State Tax Department provided constructive notice of taxes due and owing by Virginia Crews Coal Company in the total amount of $7,688.35 plus penalty and interest until paid. This Notice was recorded on the 23rd day of April, 1984 and has not been released of record.

2. By Lis Pendens recorded on the 18th day of February, 1983 in Lis Pendens Book 2 at page 74, constructive notice was provided of Civil Action 82-C-398 filed in the McDowell County Circuit Court and was designed to affect the described lands of Hawley Coal Mining Corporation to a claim for $9,362,500.00 in compensatory damages and $50,000,000.00 in punitive damages for breach of contract.

NOTE: Your abstractor is of the opinion that this instrument involves lands other than the acreage that is the subject of this report; however, this matter will be addressed in the Special Objections and Requirements section of this report.

3. Numerous Mechanics' Liens have been filed against Hawley Coal Mining Corporation in Mechanics' Lien Book 6 at pages 372, 218, 217, 216 and 215 by employees for unpaid wages.

NOTE: It is the opinion of your abstractor that the Mechanics' Lien filed in Book 6 at page 372 does not affect the subject acreage since it was filed on the 2nd day of February, 1985, after Hawley's conveyance to Virginia Crews Coal Company. It is the further opinion of your abstractor that the remainder of the above mentioned Mechanics' Liens would be barred by the statute of limitations. In addition, I am advised that the distant possibility exists that Hawley Coal Mining Corporation has filed bankruptcy; however, your abstractor could find no record of the same in the office of the County Clerk.

EASEMENTS:

1. By instrument dated January 1, 1979, recorded February 27, 1979 in Deed Book 347 at page 659, Howley Coal Mining Corporation granted a pipeline easement to Hope Natural Gas Company.

2. By instrument dated February 6, 1973, recorded in Deed Book 304 at page 67, Hawley Coal Mining Corporation granted a standard power line right of way to Appalachian Electric Power Company.

3. By instrument dated February 27, 1967, recorded in Deed Book 271 at page 73, Pocahontas Empire Coal

Corporation granted a standard power line right of way to Appalachian Electric Power Company.

4. By instrument dated September 11, 1963, recorded January 9, 1964 in Deed Book 257 at page 314, Pocahontas Empire Coal Corporation granted a standard power line right of way to Appalachian Electric Power Company.

5. By instrument dated June 3, 1960, recorded June 16, 1960 in Deed Book 245 at page 119, Pocahontas Empire Coal Corporation granted a standard power line right of way to Appalachian Electric Power Company.

6. By instrument dated April 21, 1954, recorded June 2, 1954 in Deed Book 212 at page 284, Roderfield Realty Company granted a standard power line right of way to Appalachian Electric Power Company.

7. By instrument dated July 7, 1952, recorded December 3, 1952 in Deed Book 204 at page 211, Roderfield Realty Company granted a right of way for the construction of an 8″ gas pipeline to Godfrey L. Cabot, Inc.

8. By instrument dated July 18, 1950, recorded November 30, 1950, Roderfield Realty Company granted a right of way for the construction of a 6″ gas pipeline to Godfrey L. Cabot, Inc.

9. By instrument dated January 17, 1950, recorded February 20, 1950 in Deed Book 190 at page 194, J. A. Blevins and Ora Blevins, his wife, granted a standard power line right of way to Appalachian Electric Power Company.

10. By instrument dated May 15, 1947, recorded February 2, 1948 in Deed Book 179 at page 56, Roderfield Realty Company granted a standard power line right of way to Appalachian Electric Power Company.

11. By instrument dated November 6, 1946, recorded December 28, 1964 in Deed Book 172 at page 413, Roder-

field Realty Company granted a standard power line right of way to Appalachian Electric Power Company.

12. By instrument dated August 3, 1945, recorded September 7, 1945 in Deed Book 165 at pages 27, 98 and 99, Roderfield Realty Company granted standard power line rights of way to Appalachian Electric Power Company.

13. By instrument dated November 8, 1944, recorded November 15, 1944 in Deed Book 161 at page 481, Famous Pocahontas Coal Company granted a right of way 60 feet in width for the construction, operation and maintenance of a telephone and telegraph line to The Chesapeake and Potomac Telephone Company of West Virginia.

NOTE: This instrument increased the width of a previously granted right of way 40 feet in width (see next entry).

14. By instrument dated November 29, 1924, recorded December 3, 1924 in Deed Book 100 at page 403, Welch Pocahontas Land Company granted a right of way 40 feet in width for the construction, operation and maintenance of telephone and telegraph lines to The Chesapeake and Potomac Telephone Company of West Virginia.

15. Norfolk and Western Railway Company obtained a right of way from Westchester Pocahontas Coal Company for use as a siding by instrument dated August 7, 1923 and recorded on the 1st day of October, 1923 in Deed Book 96 at page 85.

TAXES:

The coal and minerals for the subject real estate are listed for taxation in the 1984 Browns Creek District Land Books as follows:

Pocahontas Empire Coal Co., 311.96 A. Coal at 200 A. 1010. 34 A. Hensley Creek Min.

Taxes for the year 1984 and all prior years have been paid. Taxes for the year 1985 constitute a statutory lien against the subject acreage but are not yet due, ascertainable or payable. Taxes are $901.99 per half year.

The taxation for the coal and minerals for the subject acreage will appear on the 1985 Land Books as follows:

Virginia Crews Coal Co., 1010.34 Ac. Min. & Coal only, Hensley Creek and 311.96 Extra legal - N; Homestead - N

NOTE: Normally we would not report tax listings for past years; however, since we deem these listing to be important indicia of ownership, the listing were as follows:

1920	McCormick, Henry	30.35.16 A.
21-26	Welch Poca. Land Co.	7.64, 455, 547.7 Ac.
27-30	Westchester Coal Co.	7.64, 455, 547.7
31-38	Famous Poca. Coal Co.	7.64, 455, 547.7456 A.
39-44	Famous Poca. Coal Co.	7.64, 547.7, 456 A.
45	Famous Poca. Coal Co.	7.64, 547.7, 456 A.
46-58	Roderfield Realty Company	7.64, 455, 540.10 A.
59-61	Signaigo, Leo J., Jr.	1002.74 Min. or Timber, Hensley Creek
62-70	Empire Coal & Land Co.	1,010.34 Ac. Hensley Cr.
71	Pocahontas Empire Coal Corp.	1,010.34 Ac. Hensley Cr.
72-78	Pocahontas Empire Coal Corp.	1,010.34 Ac. Hensley Cr. Estate owned and description
79-82	Pocahontas Empire Coal Corp.	1,010.34 Ac. Hensley Cr. Min.
1983 (Begin Computer)		
	Pocahontas Empire Coal Co.	311.96 A. Coal at 200 1,010.34 Ac. Hensley Cr. Minerals
1984	Pocahontas Empire Coal Co.	311.96 A. coal at 200 A 1,010.34 Ac. Hensley Cr. Minerals; $901.99 per half year. Paid August 1984, March 1985

NOTE: On two different occasions these interests were sold for taxes, but notations on the Assessor's Land Books indicate redemption took place prior to execution of a deed for said interests.

Taxes for the surface which is presently in several different parcels (at least 16) is not reported. Should this information be required, please advise.

SPECIAL OBJECTIONS AND REQUIREMENTS

1. The deed set out in paragraph 28 of the History of Title indicates that it was recorded prior to the date of execution. It is my opinion that this is a clerical error and any problem caused by this error would have been cured by the statute of limitation.

2. Paragraphs 34, 38, 40, 44 and 48 indicate failure to record certificates of incorporation for the named corporate entities. West Virginia law requires recordation of certificates of incorporation in every county in which a corporate entity does business. Obtain and record certificates of incorporation for these named corporations.

3. From the deed records and the lack of signature by the respective spouses of Vance McCormick and Anne McCormick your abstractor cannot determine marital status; however, the individuals if living would be in excess of 100 years of age and dower interests, if any, would be negligible.

4. The deed that is set out in paragraph 46 of this report in the History of Title section represents a fee conveyance and the 7.6 acres is located inside of the boundaries of the 547.7 acre tract. Locate and define the boundaries of this tract and under no circumstances locate and/or drill on the 7.6 acre parcel.

5. The deeds that we set out in paragraphs 47 and 49 of this report in the History of Title section represent outsales of surface and in the event that deep well drilling is contemplated on the subject acreage, written consent for valuable consideration must first be obtained from the surface owners in compliance with the provisions of West Virginia Code Chapter *22, Article 4-A*, Sections *7(b)(4)*, as amended.

6. Satisfy yourselves by physically inspecting the premises that at present there are no oil or gas wells situate thereon or upon any adjoining leases with which the subject leasehold has been pooled or unitized which are still producing oil and/or gas thereby verifying that the unreleased oil and gas leases described in this report have expired by their own terms.

7. The deed referred to in paragraph 51 of the History of Title is, of course, quite a crucial matter to your lessor's title, and under the present circumstances and without a ratification or other document from Virginia Crews Coal Company you would not have a good and defensible right and title to develop the oil and gas. Furthermore, as mentioned in the letter opinion of my brother referred to in the Note in paragraph 51, it is our opinion that Virginia Crews Coal Company has a better title to the oil and natural gas under the subject realty, except for the oil and gas in the Pocahontas No. 3 and No. 4 seams, than does Tug Fork Land Company.

Therefore, no drilling should be contemplated unless and until such time as either a ratification or other legal document of lease or conveyance is obtained from Virginia Crews Coal Company.

Furthermore, in looking at the language in the deed in question as Tug Fork Land Company might view it, it would have to be their position that the language in paragraph 2(a) regarding "all the oil and gas" would not be limited to just the Pocahontas No. 3 and No. 4 seams. Of course such an interpretation is possible and could conceivably be confirmed by a Court, however it is our opinion that you would be stretching that language by doing so as that language must be read in conjunction with the remainder of the sentence which provides for reservation as well of all the coal in the Pocahontas No. 3 and No. 4 seams in the three tracts of land being conveyed. On the other hand, it would not be safe to drill upon the tract merely upon a quit claim deed, lease or

assignment just from Virginia Crews Coal Company, without some lease or ratification from Tug Fork Land Company as they are obviously claiming title to the oil and gas by reason of their lease to your company. You may, therefore, wish to test Tug Fork Land Company's claim to title by either a suit to clear cloud on title in advance of drilling or upon obtaining a lease, quit cliam deed or ratification from Virginia Crews Coal Company proceed to drill the property and in the event of production file suit at that juncture to test the title to the oil and gas.

8. Coal is the dominant estate underlying the subject acreage. Comply with the pertinent provisions of the West Virginia statutes that require notice, etc. to the owner and operator of the various seams. (See West Virginia Code Chapter 22, Articles 4, 5 and 7.)

DISCLAIMERS AND ADVISORY COMMENTS

1. This opinion does not cover any matters not revealed by the materials examined, rights of the parties in possession or matters which could only be determined by an investigation upon the ground or by an accurate survey of the land.

2. The personal records examination which I performed and upon which I have relied appears satisfactory in scope and substance and I believe that you and I are justified in relying upon the same.

3. The oil and gas lease described in this report provides for a one-eighth (1/8) landowner's royalty upon oil, gas and other hydrocarbons calculated at the well head price.

4. All references herein to deed books, lease books, will books, etc. refer to those books maintained in the office of the Clerk of the County Commission of McDowell County, West Virginia, unless otherwise so stated, and this opinion is subject to all errors and omissions in the

records and indices of records in the offices of the Clerks of the County Commission, Circuit Court, Assessor and Sheriff of McDowell County, West Virginia, and is further subject to all unrecorded Mechanic's and Materialmen's Liens affecting the subject property.

Very truly yours,

/s/ Kennad L. Skeen
KENNAD L. SKEEN

KLS/bjr

Attachments

APPENDIX D

PLAINTIFF'S EXHIBIT NO. 2

SKEEN AND SKEEN
Attorneys and Counsellors at Law
216 Mail Street
Ripley, West Virginia 25271

May 9, 1985

Mr. Mike Blumn
TXO Production Corp.
900 Charleston National Plaza
Charleston, West Virginia 25301

Dear Mike:

You have requested a brief legal memorandum on the legal effect of a mineral severance in a deed from your lessor, Tug Fork Land Company, to Leo J. Signaigo, Jr. dated September 2, 1958, regarding 7.64 acres, 547.7 acres and 455 acres and recorded in McDowell County Deed Book 238 at page 562, and you would like an opinion as to whether or not the deed transferred title of the oil and gas in place to the grantee in addition to the coal in place.

As a preliminary matter, let us consider the exact language of the severance deed in question, which provides as follows:

> "party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land:"

There is a succeeding clause in the deed in question which constitutes a further manifestation of the grant-

or's intent where the grantor excepts and reserves the oil and gas and coal in two certain coal seams, the Pocahontas #3 and #4:

> "2. It is excepted and reserved from the operation of this deed:
>
> > "(a) all the oil and gas and all the coal in the Pocahontas #3 and #4 seams in said three tracts of land above described."

It should be noted at the outset that this is a mineral severance deed, not a reservation of minerals in a deed conveying the surface. As a consequence there is no reason why the language of the deed should be construed favorably to the grantor. In fact, the legal presumption favoring the grantee and against the grantor should apply by reason of which the courts should presume that the grantor intended to sell and convey everything which was not clearly and specifically reserved.

Another rule of legal construction would also appear to apply to the deed in question: *Expressio Unius Est Exclusio Alterius*, which in essence means if you state something one way, you cannot in the same document construe the matter differently. This rule or maxim comes to bear since the grantor specifically reserved the oil and gas in the Pocahontas #3 and #4 seams. The courts would therefore be prone to say that only reserving the coal in certain seams or zones, it was the grantor's intent that the title to the oil and gas in other zones pass to the grantee.

There is another distinction to be made in instances where a deed conveys or reserves "minerals" without further explanation and instances where the language in question conveys "the coal and other minerals". In the first instance the majority of the States and the West Virginia Supreme Court generally agree that the word "minerals" includes coal, oil and gas and just about every other substance that can be gotten from under the

surface of the Earth. See Skeen, *West Virginia Oil and Gas Law* § 4.8 (1984).

In the second instance the principle of *Ejusdem Generis* applies as the grantor has first specified a particular mineral (i.e. coal) and then added the words "and other minerals" afterward. This rule of construction, if applicable, provides that the meaning of "and other minerals" is restricted to other minerals of the same class or order as coal, and in a number of decisions in West Virginia and elsewhere, oil and gas have been held to fall within the same class and therefore included within a grant or reservation of "coal and other minerals".

There is one West Virginia Supreme Court decision which would appear almost directly in point, *Jeffrey v. Spruce-Boone Land Co.*, 112 W. Va. 360, 164 S.E. 292, 8 Ga. L.R. 966 (1932). In the deed in that case, the grantor like your lessor, Tug Fork Land Company, conveyed "all the coal and minerals in and to that certain tract of land. . ." Our Supreme Court of Appeals held in that case that the minerals granted were not limited to coal but included all minerals in the land including even a stratum of pulp stone. A copy of this decision is attached for your review as well as other relevant authorities, and a review of these recent decisions indicates that it is still "good law" in West Virginia. See Skeen § 4.9 for a further discussion of this case and decisions involving similar language.

Based upon the law discussed above, it is my opinion that it is *highly probable* that the Courts of this State would follow *Jeffrey v. Spruce-Boone Land Co.* and a later case, *Prindle v. Baker*, 116 W. Va. 48, 178 S.E. 513 (1935) and hold that Tug Fork Land Company conveyed away the title to the oil and natural gas as well as the coal under the subject lands excepting only the oil and gas in the two coal seams which were specifically mentioned.

The only West Virginia case I could find which is in direct conflict with the position that Tug Fork Land Company conveyed away the oil and gas is the case of *Bruen v. Thaxton*, a 1943 decision. I have copied pertinent portions of that decision which are exclosed for your review. You will note that the *Bruen v. Thaxton* case can be distinguished on several points:

(1) It was a mineral reservation involved rather than a mineral conveyance as in the present situation and in such instances there is a strong persumption against the grantor. Applying that presumption in *Bruen v. Thaxton*, the Court found that the reserving party who reserved the coal and other minerals did not intend to reserve the oil and gas.

(2) The second distinction which can be drawn is the particular language of that reservation and evidence of the intent of the parties.

If you have further questions concerning any of the above, please advise.

Very truly yours,

/s/ Larry L. Skeen
LARRY L. SKEEN

LLS/bjr

P.S. Since dictating the above letter I have spoken with my brother and he indicates that after the conveyance from Tug Fork Land Company, Tug Fork no longer was assessed or taxed with any interest in the oil, gas or coal, which is further evidence of their intent to convey the oil and gas with the coal.

APPENDIX E

PLAINTIFF'S EXHIBIT NO. 13

LAW OFFICES OF
COLEMAN & WALLACE
11 North Kanawha Street
Buckhannon, West Virginia 26201

December 10, 1987

Mr. Larry L. Skeen
Skeen and Skeen
P.O. Box 66
Ripley, WV 25271

RE: Tug Fork Land Company deed to
Leo J. Signaigo, Jr. (DB 238, page 562)

Dear Mr. Skeen:

I have reviewed the above referenced deed as well as other subsequent deeds and leases in the chain of title for the oil and gas underlying the involved 1,002.74 acre tracts in McDowell County, West Virginia.

It is my opinion that the Tug Fork deed is ambiguous on its face and raises serious questions as to the ownership of the oil and gas underlying this tract. If I were abstracting or reviewing this title for an oil and gas producer, I would recommend strongly that no drilling operations be commenced until one of the following courses of action be pursued:

(1) A declaratory judgment action be instituted in the Circuit Court of McDowell County to determine ownership of the oil and gas, with all parties having a possible royalty or overriding royalty interest (or leasehold interest) being named as parties;

(2) Leases be obtained from *both* Tug Fork Land Company and Virginia Crews Coal Company and an interpleader action be instituted in the Circuit Court of McDowell County to determine the proper party to whom to pay royalties. (It is my understanding that you hold a lease from Tug Fork by assignment);

(3) Obtain, if possible, a deed from Virginia Crews Coal Company. Although not required, in my opinion, under West Virginia law, I would recommend to my producer that they offer to sell any rights acquired under the deed to Tug Fork or our assignor under the Tug Fork lease for our costs, including consideration, attorney fees, landman costs and expenses and other necessary expenses, in obtaining the deed. If Tug Fork or our assignor under the Tug Fork lease declined to accept the offer, then I would consider that we were thereafter in an adverse position as to ownership and I would recommend instituting a declaratory judgment action to determine if Tug Fork or my producer had the superior title.

Frankly, I would not certify that Tug Fork reserved title to the oil and gas in its deed to Leo J. Signaigo, Jr. This deed on its face purports to convey "*all* the coal and *other* minerals and mineral substances. . . ." I would interpret this granting clause as conveying all of the oil and gas and would treat the deed as a conveyance of the oil and gas unless other provisions of the deed would indicate otherwise.

As to other provisions in the deed, Paragraph 2(a), page 3, contains an excetpion and reservation of "all the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams. . . ." This clearly is a reservation and exception only of the so-called coalbed gas in these two coal seams and hardly could be interpreted as a reservation of all the oil and gas underlying the involved tracts.

Paragraph 6, page 5, of the deed, in my opinion, gives Tug Fork its only hope of establishing title to all of the

oil and gas. As you know, this paragraph excepts and reserves specifically, rights to mine and remove all of the Pocahontas No. 3 and No. 4 seams of coal and then recites, "together with the right to bore for and remove *all the oil and gas underlying said tracts. . . .*", with further provision that such rights are to be used in common with the grantee and so as to interfere as little as possible with mining operations of the grantee. This provision, in my opinion, raises serious questions as to whether or not Tug Fork intended to convey (a) all of the oil and gas except for the two coalbed seams of oil and gas; or (b) intended to convey only the two coalbed seams of oil and gas. Frankly, the former interpretation seems to be the most logical as if the second interpretation were intended, it would seem to me that the grantor would have *specifically conveyed* only the two coalbed seams of oil and gas. I find it hard to accept the premise that the grantor would have bothered to reserve and except specifically the coalbed oil and gas if its intentions were not to convey any of the oil and gas in the first place. In any event, it would appear absolutely foolhardy for a producer to risk the large capital investment required in drilling and equipping a well without clarifying this title question.

It is my understanding that Tug Fork was not assessed for oil and gas following the Signaigo deed. This fact also causes serious problems for me as it could be interpreted as showing an intent not to reserve all of the oil and gas if the deed is held to be ambiguous on its face and extrinsic evidence is permitted to help resolve the ambiguity.

In summary, I would view these matters as constituting a most serious title defect or cloud on title. If abstracting this title, I would not certify the title. If reviewing the title as an in-house attorney, I would not permit drilling to commence without taking some course of action as outlined herein.

For your information, I am a 1955 graduate of the WVU College of Law. I have practiced in a law partner-

ship (Coleman and Wallace) at Buckhannon, since December of 1958. My practice has been a general practice of law, with heavy emphasis on mineral law (coal, oil and gas). Since 1980, I have maintained my private law practice as well as working in-house as General Counsel or Assistant General Counsel of Union Drilling, Inc., a drilling contractor and oil and gas producer at Buckhannon. In the course of my practice, I have abstracted literally thousands of oil and gas titles for Union and numerous other oil and gas developers. I also have reviewed numerous title abstracts prepared by other attorneys and have been responsible for making the determination as to how to resolve title defects and whether or not to authorize drilling.

On many occasions, I have myself actually instituted or recommended the institution of declaratory judgment or interpleader actions to determine ownership or remove clouds on title. I consider this to be an acceptable and preferred alternative in doubtful cases to proceeding with drilling and running the risk of being divested of title and possibly subjecting my clients to treable (sic) damage judgments. In my opinion, this is the standard method of proceeding not only in a mineral transaction but in any real estate transaction where a potential title dispute exists.

If I can be of further help to you, please advise.

Sincerely,

/s/ Robert J. Wallace
ROBERT J. WALLACE

RJW:mdw
1R/2

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-479

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae. The written consents of all parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioner.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's govern-

ing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, all of EEAC's members, and the constituents of its trade association members, are subject to claims for punitive damages under a variety of federal and state laws and common law causes of action, including 42 U.S.C. § 1981, many state fair employment practices laws, and most state law tort actions arising out of the employment relationship. EEAC's members also are potential targets for jury trials for compensatory and punitive damages under the Civil Rights Act of 1991 (P.L. 102-166 (1991)), which added these damages to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Although the '91 Act capped these damages for large employers presently at $300,000 for each claimant, Congress is likely to consider legislation this year to lift this cap altogther.

Thus, the issues in this case are extremely important to the nationwide constituency which EEAC represents. In its decision below, the Supreme Court of Appeals of West Virginia decided that the amount of punitive damages awarded by a jury could turn on whether the defendant had been "really mean" or just "really stupid." Finding that the petitioner had been "really mean," the court approved a $10 million punitive damages award that was 526 times greater than the $19,000 award for compensatory damages. We agree with Chief Justice McHugh's concurring opinion that "[i]n its cavalier attempt to be clever and amusing," the court ignored traditional fundamental standards for assessing punitive

damages and "offered no practical guidance" for analyzing punitive damages cases. (Pet. App. at 53a-54a).[1]

Recent jury awards cry out for new guidance from this Court. For example, and as shown below, in 1992 alone, juries in employment discrimination cases have awarded single plaintiffs $124 million, $20.3 million and $7.1 million. Employers are extremely concerned that individual juries with no experience in employment cases could have a field day awarding large punitive damages awards under the vague "really stupid/really mean" criteria.

EEAC's members also are outraged by the West Virginia Supreme Court of Appeals' preposterous assertion that:

> The threat of litigation is good news to middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.)

(Pet. App. at 37a). Far from welcoming litigation, EEAC members and their managers at all levels take their statutory obligations very seriously and attempt to comply with the law rather than litigate. As shown below, EEAC members have instituted preventative programs to counter employment discrimination and harassment. Employees are advised of these programs, and company procedures are in place whereby aggrieved employees can inform higher management authorities or ombudspersons of possible discriminatory conduct. These policies call for prompt and effective remedial action by the employer, including appropriate discipline of the offender.

Because of its concern that this Court establish meaningful standards for punitive damages, EEAC filed an

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[1] "Pet. App." references are to the Appendix to the Petition for Writ of Certiorari.

amicus curiae brief in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Since its founding in 1976, EEAC, acting on its interest in issues involving damage awards under the nation's labor and employment laws, has participated as *amicus curiae* in over 300 cases, including *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (appropriateness of remedies); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (scope of § 1981); *Murphy v. American Motor Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978) (punitive damages under ADEA); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (tolling of back pay liability under Title VII); *Rawson v. Sears, Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (size of jury award in state law claim); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) (supporting employer's discharge of supervisor accused of sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (Arguing for vacation of arbitrator's award which violated the public policy condemning sexual harassment).

EEAC seeks to assist the Court in this case by highlighting the impact its decision here may have on the field of employment litigation. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

This case arose out of a title dispute over mineral rights. TXO Production leased the oil and gas rights to a tract of land in West Virginia from Alliance Resources. TXO's title attorney later found a cloud on Alliance's title. TXO filed a quit claim deed, then filed an

action to quiet title. Alliance counterclaimed for slander of title, arguing that the title cloud was a sham that TXO created to use as leverage and improve its position in their business dealings.

The jury found for Alliance, awarding the plaintiff $19,000 in compensatory damages. The jury also awarded $10 million in punitive damages, a sum that is 526 times the compensatory award.

The West Virginia Supreme Court of Appeals affirmed and articulated a novel standard for reviewing punitive damages awards. If the case only involves "really stupid" defendants, the court said, punitive damages should be in approximately a five-to-one ratio to compensatory damages. But where the defendants are "really mean," however, punitive damages of 500 times the compensatory award could stand. On this basis, the decision of the jury was affirmed.

The court failed to apply standards developed in the U.S. Supreme Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), or its own decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 904-09 (W. Va. 1991). Those standards included factors such as the relationship between the harm and the damages; the reprehensibility and duration of the defendant's conduct; any similar past conduct; the profitability of past conduct; the financial position of the defendant; and the existence of other civil or criminal sanctions against the defendant for similar conduct.

In a concurring opinion, Chief Justice McHugh disagreed with the majority's "ridiculous categorization" (Pet. App. at 54a) of defendants as either "really stupid" or "really mean." The Chief Justice stated:

> In its cavalier attempt to be clever and amusing, the majority opinion has carelessly ignored the fundamental factors which have traditionally been used by

courts to characterize the conduct of defendants in assessing punitive damages.

(Pet. App. at 53a).

Indeed, the Chief Justice pointed out that "none of the courts in the punitive damages cases cited by the majority use the terms 'really stupid' or 'really mean' when describing the defendant's actions in their review of the punitive damages awards." (Pet. App. at 53a-54a). Thus, the concurrence concluded that "the majority has offered no practical guidance to attorneys or judges in analyzing punitive damages cases." (Pet. App. at 54a).

SUMMARY OF ARGUMENT

As many Justices of this Court have observed, unrestrained jury discretion to award punitive damages presents a significant issue under the Due Process Clause. Lacking any guidance as to the appropriate monetary range within which to set an award, juries are left to wander blindly amid concepts of punishment and deterrence, groping in the dark for a suitable amount. Such standardless discretion offers a defendant no warning of its potential liability, and no Constitutional safeguards, even though punitive damages are "quasi-criminal" in nature.

Standardless jury discretion to award punitive damages is of substantial concern to employers. Punitive damages are available in employment-related claims under federal and state laws such as 42 U.S.C. § 1981, state fair employment practices statutes, and various state tort laws that have been put to use in employment cases. In addition, pending legislation in Congress would lift the $300,000 cap on compensatory and punitive damages now available under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Juries have awarded exorbitant sums as punitive damages in employment-related claims. And as shown by the instant case, judi-

cial authority to modify such awards cannot always be relied upon to block such abuses.

Moreover, unrestricted punitive damages awards are antithetical to the remedial and conciliatory goals of federal labor and employment laws. Notwithstanding its recent amendments, a primary goal of Title VII remains the resolution of differences through conciliation rather than litigation. By holding out the hope of a large dollar jury award, the availability of unrestricted punitive damages operates as a serious disincentive to conciliation.

Also of serious concern to employers is the imposition of punitive damages awards against corporate defendants solely on the basis of the doctrine of *respondeat superior*. In the employment law context, use of *respondeat superior* to support a punitive award is particularly inappropriate.

The court below improperly allowed the amount of punitive damages to turn on whether the employer's actions were "really stupid" or "really mean." This standard is hopelessly vague and must be rejected by this Court. Instead, a more meaningful standard must be adopted *and included in jury instructions* in order to place proper limits on punitive damages awards.

First, there must be some reasonable relationship between the amount of punitive damages and actual damages. Next, the jury should be instructed that the depth of the defendant's "pockets" is not a proper consideration. Also, the jury must be instructed to look to the facts in the particular case and not base its decision on personal or societal generalizations about a particular employer or corporations in general.

Further, juries should be instructed that punitive damages should be mitigated if the employer has adopted programs to prevent discrimination or established internal procedures to investigate and punish offenders. Finally, the plaintiff's failure to utilize alternative ave-

nues of relief also should be considered as mitigating punitive damages.

ARGUMENT

I. STANDARDLESS JURY DISCRETION TO AWARD PUNITIVE DAMAGES VIOLATES DUE PROCESS

The issues before the Court in this case are extremely important to private employers facing potential punitive damages awards in employment-related cases. EEAC's members share this Court's "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991).

A. This and Other Courts Have Expressed Well-Founded Due Process Concerns Over Unrestrained Jury Discretion to Award Unlimited Punitive Damages

In *Pacific Mutual*, the Court summarized at length the reasons why unlimited jury discretion to award punitive damages may violate the Due Process Clause of the U.S. Constitution:

> This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damages awards.

111 S. Ct. at 1038-40. Particularly well-stated was Justice Brennan's complaint in *Browning-Ferris* that:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important and potentially devastating decision.

Id. at 1039 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989)). This unpredictability stems in part from the fact that:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

Id. at 1040 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

While one could speculate about the motives of individual jurors, this Court should establish clear standards to carry out its earlier directive that governments "have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

This Court also has stressed that:

> [T]he fact finder must be guided by more than the defendant's net worth . . . . [P]laintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Pacific Mutual, 111 S. Ct. at 1045. As was pointed out in the labor relations context, there also is the danger that "punitive damages may be employed to punish unpopular defendants." *IBEW v. Foust*, 442 U.S. 42, 50 n.14 (1979). As the Court stated in *Foust*:

> "[S]ince juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger . . . ."

Id. (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

B. Applying Punitive Damages Standards Should Be More Than an Appellate Exercise. Any Standards This Court Establishes Must Be Contained in the Actual Instructions Given to the Jury

The concerns expressed by this Court about excessive punitive damages have not made their way into the jury rooms where employment discrimination cases are considered. As shown below, in a growing number of instances, jury awards have gotten out of hand, with juries awarding multiple-millions of dollars to individual plaintiffs in single-incident discrimination cases. In these cases, the amount of damages grossly exceeds proven compensatory damages.

We strongly urge, therefore, that whatever standards the Court adopts, the Court should also direct that these standards be incorporated *as part of the jury instructions* in cases with potential punitive damages. The application of these standards should entail more than a legal duelling match between the trial and appellate courts. As Justice O'Connor has pointed out, appellate review is impossible where "juries are not told which factors are permissible and which are not." *Pacific Mutual*, 111 S. Ct. at 1063 (O'Connor, J., dissenting).

II. UNRESTRICTED PUNITIVE DAMAGES AWARDS THREATEN THE NATION'S EMPLOYMENT LAWS

A. The Threat of Unlimited Punitive Damages Exists in Employment-Related Claims Under Federal and State Law

The issue presented here, whether due process is violated by a standardless award of punitive damages, is of substantial importance to employers throughout the United States. Employers can be, and have been, held liable for punitive damages for causes of action arising out of the employment relationship on a number of grounds. 42 U.S.C. § 1981 prohibits racial discrimination in all aspects of employment contracts, and punitive damages are available under that statute. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Some states have adopted "fair employment practices" laws that substantially parallel the coverage of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Of these, several provide expressly for punitive damages by statute. *See, e.g.*, New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*, as amended February 8, 1990, A.B. 2872). Others have been interpreted judicially to provide for punitive damages awards. *Grant v. Monsanto Co.*, 51 Fair Empl. Prac. Cas. (BNA) 1593 (S.D. Ohio, 1989) (compensatory and punitive damages available under Ohio Fair Employment Practice Law).

In addition, many states allow employees to pursue common law causes of action in tort arising out of incidents in the workplace. For instance, in addition to Title VII liability, a sexual harassment claim can give rise to tort claims under state law for intentional infliction of emotional distress or even assault and battery, which in turn can lead to an award of punitive damages.[2] Also, the traditional doctrine of employment-at-will has been eroded significantly in recent years through judicially-created exceptions such as "tort claims of wrongful discharge in violation of public policy, contract based claims of wrongful discharge in violation of an employer's policies, and a new tort of abusive or wrongful discharge." I. Shepard, P. Heylman, and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 17 (1989). Punitive damages often are available under tort theories, and while contract claims do not usually support such a recovery, some states

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[2] *See, e.g., Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986), *aff'd*, 833 F.2d 1226 (7th Cir. 1987) ($12,960.50 in back pay under Title VII and $50,000 in compensatory and $50,000 in punitive damages on state tort claims of battery and intentional infliction of emotional distress awarded to sexual harassment plaintiff).

allow an award of punitive damages on a theory of "tortious or bad faith breach of contract." *Id.* at 212.

Moreover, the Civil Rights Act of 1991 amended Title VII and the Americans with Disabilities Act to allow juries to award compensatory and punitive damages for intentional discrimination. *See* 42 U.S.C. § 1981a. For punitive damages to be recovered, the respondent must have engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). But these amendments provide absolutely no guidance on how to measure the amount of punitive damages.[3]

Presently, the total of compensatory and punitive damages awardable under the ADA and Title VII to an individual plaintiff is capped at $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). However, legislation has been introduced in the new Congress that would remove the cap, thus allowing for unlimited damages. See H.R. 224, 103rd Cong., 1st Sess. (1993) ("Rep. Kennelly Renews Push to Uncap Damages Under 1991 Civil Rights Law," Daily Lab. Rep. (BNA), Jan. 6, 1993, at A-1). EEAC's members would be particularly concerned if the "really stupid/really mean" standard could be used under these statutes, particularly the Americans with Disabilities Act, whose substantive standards are completely untested by federal litigation.

Thus, employers are exposed on several fronts to the possibility of unrestricted punitive damages awards of the type at issue in this case. As now shown, recent jury

[3] Likewise, the federal circuits have adopted for Section 1981 cases the standard of "reckless or callous disregard for plaintiff's rights, as well as intentional violations of federal law" set by this Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983). *See, e.g., Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 109 S. Ct. 564 (1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir. 1987). Like the Civil Rights Act of 1991, however, Section 1981 and these cases afford no guidance to a jury on assessing the size of an award.

punitive damages awards have been so outrageously out of proportion to the proven compensatory damages that it is evident that no principled standard has been applied. More likely than not, the jury was motivated more by the size of the employer and the depth of its pockets than any other standard.

B. Punitive Damages Awards in the Employment Context Are "Skyrocketing"

Punitive damage awards, particularly in the business context, are increasing by leaps and bounds. A 1987 RAND study, *Punitive Damages: Empirical Findings*, reported massive increases in the number and size of punitive damage awards in business/contract cases, including employment claims, between 1960 and 1984.[4]

Before this Court's *Pacific Mutual* decision, awards in the employment field were staggering. A jury in Texas last year awarded $31,000,000 (reduced to approximately $21,000,000) to an accountant who claimed that his former employer wrongfully fired him after he refused to sign what he believed were fraudulent tax returns. *Sims v. Kaneb Services, Inc.*, No. 8602474 (Harris County, Texas District Court) (settled during pendency of motion for new trial). A former Xerox employee who claimed that the new job she was offered after her old position was discontinued was not what she had been promised won a jury award of $139,716 in compensatory damages and $8,750,000 punitive damages on a pendent state fraud claim, along with $145,000 back pay on an age discrimination claim. *Layman v. Xerox*, No. CA3-87-1733 (N.D. Tx., Dallas Div. 1990).

If anything, the problem has gotten worse since the *Pacific Mutual* decision was handed down. For example, in May 1992, a Texas state court jury awarded $124

[4] M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* at vi (1987). *See also Pacific Mutual*, 111 S. Ct. at 1066 (O'Connor, J., dissenting).

million dollars to a Triton employee who claimed that he was wrongfully terminated.[5] In January of the same year, a jury in New York awarded $7.1 million dollars in compensatory and punitive damages to an American Airlines executive who alleged that she was passed over for promotion to the job of general manager of the airline's LaGuardia Airport office.[6] Texaco appealed a state court jury award of $20.3 million dollars to a former executive in a sex discrimination case in California.[7] Likewise, an Oregon jury awarded $6.2 million dollars to a former executive alleging wrongful termination;[8] $3.9 million dollars was awarded to a former employee of Hughes Aircraft Co. who alleged that he was fired because he was black;[9] a Michigan jury awarded $1 million dollars to a former salesman for General Electric Co. who claimed that his discharge during a reduction-in-force violated oral assurances of job security that he had recieved during his interview;[10] and a California jury awarded almost a million dollars to a former employee who alleged breach of contract and intentional infliction of emotional distress due to a negative reference given to a potential employer.[11]

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[5] *Janacek v. Triton Energy Corp.*, No. 90-07220-M (Texas Dist. Ct. May 22, 1992).

[6] Tamar Lewin, Woman Gets $7 Million in Airline Discrimination Suit, *The New York Times*, January 25, 1992.

[7] *Martin v. Texaco Refining and Marketing Inc.*, No. C614044 (Cal. Super. Ct. July 17, 1992).

[8] *Banaitas v. Mitsubishi Bank Ltd*, No. 89-12-07357 (Ore. Cir. Ct. March 19, 1991).

[9] *Harris v. Hughes Aircraft Co.*, No. 010988 (Cal. Super. Ct. June 4, 1992).

[10] *Pietsch v. General Elec. Co.*, No. 89-906227-CZ (Mich. Cir. Ct. April 2, 1991).

[11] *Holton v. Lockheed Corp.*, No. 642082 (Cal. Super. Ct. January 28, 1991).

Furthermore, studies indicate that plaintiffs who risk seeing litigation through to the end of a jury trial will find that juries are more likely to announce a plaintiff's verdict than a verdict in favor of employers. For example, the Institute for Civil Justice, part of RAND Corporation's domestic research division, found that plaintiffs were victorious 70 percent of the time in employment cases ending in a jury trial.[12] Orrick, Herrington & Sutcliffe recently found almost the same result—in a study of all state and federal California courts, juries found in favor of the plaintiff in 61.48 percent of the cases.[13] These studies demonstrate that jury trials are more receptive to plaintiffs than to employers.

The likelihood that they will win before a jury and the possibility of receiving an exorbitant monetary award strongly encourages plaintiffs and plaintiffs' attorneys to proceed to litigation. With such an enormous pay day looming at the end of litigation, plaintiffs and their attorneys may find little reason to explore alternative avenues of resolution. Fewer and fewer employment cases may settle before trial, thus adding to the burgeoning caseload of the federal dockets.

Moreover, awards like those cited above clearly bear "no . . . relation to the actual harm caused," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), and are "be[ing] employed to punish unpopular defendants." *IBEW v. Foust*, 442 U.S. 42, 50 n.14 (1979). In each of these cases, the only rational explanation for the massive award is that the jury sought to punish a large employer by granting the plaintiff a windfall far in excess of actual damages.

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[12] Dertouzos, James N. and Lynn A. Karoly, *Labor Market Responses to Employer Liability*, Institute for Civil Justice, April 5, 1992. The researchers concentrated their study on California juries.

[13] Orrick, Herrington & Sutcliffe, *Employment Law Verdicts*, Labor and Employment Department, June 24, 1992.

Admittedly, federal courts generally have discretion to set aside an excessive jury verdict and order a new trial, or order remittitur of a portion of the verdict that it finds to be excessive. *See generally* 6A Moore's Federal Practice § 59.08[6] (2d Ed. 1989).[14] Similar procedures are available in the states. *See, e.g.*, Ill. Rev. Stat. Ch. 110, Para. 2-1207 (1988) (granting trial court statutory authority to order remittitur and conditional new trial in case of excessive jury award of punitive damages).

As the instant case exemplifies, however, this authority is not a guarantee, as the reviewing courts also are without adequate standards, and may come up with criteria as vague and outlandish as this case's "really mean/really stupid" test.

C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law

Unrestricted punitive damages awards are particularly inappropriate because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case generally never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most

[14] *See also Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (upholding lower court's grant of judgment notwithstanding the verdict and in the alternative for a new trial on grounds, *inter alia*, that jury award of $2,500,000 in claim under 42 U.S.C. § 1981 was excessive); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985) (granting new trial on issue of punitive damages in employment discrimination action under 42 U.S.C. § 1981 unless plaintiff agrees to remittitur from $150,000 to $20,000); *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. deined*, 470 U.S. 1054 (1985) (reversing and remanding $500,000 punitive damages award under 42 U.S.C. § 1981 for new trial).

labor and employment disputes involve individuals and companies with ongoing relationships that began before the dissension and are expected to continue after the parties' differences are resolved. *Cf. IBEW v. Foust*, 442 U.S. at 51-52. (". . . the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations").

Even though punitive damages were added by the Civil Rights Act of 1991, Title VII retains the provisions which require and encourage conciliation and resolution rather than litigation.

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added).

The availability of unrestricted punitive damages would seriously hamper these conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness of the parties before them to settle, have found general damages awards to be a serious impediment to conciliation and settlement in employment litigation.[15] As these judges have observed, the hope of

[15] The potential effect on the conciliation process of the availability of an unquantified damages remedy was best expressed by

a "big ticket" damages award at trial is a major disincentive to resolution of cases without litigation.

Even though unlimited punitive damages are not now available under Title VII, the Age Discrimination in Employment Act [16] and other federal labor and employment statutes, plaintiffs frequently add pendent state claims to discrimination complaints under federal law. *Cf. United Mine Workers of America v. Gibbs*, 383 U.S.

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courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1039 n.8 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant."); *Dean, supra* at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process."); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.").

[16] The Age Discrimination In Employment Act does provide for "liquidated damages" in cases of "willful" violations, but these damages are strictly limited to an amount equal to the "unpaid compensation." 29 U.S.C. § 626(b). Moreover, a "willful" violation occurs only when employer acts with "knowing or reckless disregard for whether or not the challenged conduct violated the Act." *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985).

720 (1966) (doctrine of pendent jurisdiction). These state law claims often afford a punitive damages remedy where federal law does not. The possibility of an unrestricted punitive damages award under state law thus has the same deleterious effect on conciliation efforts as would the availability of such an award under the federal statute itself.

III. STANDARDS SHOULD BE ESTABLISHED TO LIMIT JURY DISCRETION TO AWARD PUNITIVE DAMAGES. THOSE STANDARDS SHOULD INCLUDE MITIGATING FACTORS BASED UPON EMPLOYER ATTEMPTS TO COMPLY WITH APPLICABLE LAW

From the foregoing discussion, it is evident that there is a justifiable concern that juries have not been given proper instructions on awarding punitive damages. And as argued above, these standards should be included *in the jury instructions*. This would help insure not only that juries know "which factors are permissible and which are not" (*Pacific Mutual*, 111 S. Ct. at 1063 (O'Connor, J., dissenting)), but also assist supervising trial and appellate courts in having some basis for meaningful court review.

The *Pacific Mutual* case set forth a number of standards for use in determining punitive damages. *See* 111 S. Ct. at 1045. Justice O'Connor's dissenting opinion in *Pacific Mutual* also contains a number of suggestions worthy of consideration. *See* 111 S. Ct. at 1063-65. Indeed, the West Virginia Supreme Court of Appeals, relying on *Pacific Mutual*, adopted a list of standards in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (1991). Unfortunately, that court failed to apply those standards in any meaningful way and, instead, adopted the totally meaningless "really stupid/really mean" rule. Not only is this test hopelessly vague, but it allows inexperienced juries to apply a comparative standard with no basis in experience to make any meaningful comparison to other

employment cases or contexts. Set forth below are a number of suggested standards for jury instructions in cases involving corporate defendants in employment discrimination cases in which punitive damages are sought.

A. There Must Be A Reasonable Relationship Between Punitive Damages And Actual Damages

Punitive damages should not be awarded in amounts disproportionate to the harm actually suffered. Thus, the jury should be instructed to consider "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct and the harm that actually has occurred." *Pacific Mutual*, 111 S. Ct. at 1032. "If the actual or likely harm is slight, the damages should be relatively small." *Garnes v. Fleming Landfill*, 423 S.E.2d at 904.

B. That the Defendant Has "Deep Pockets" Is Not Sufficient to Justify a Large Punitive Damages Award

Although the "financial position" of the defendant may be considered (*Pacific Mutual*, 111 S. Ct. at 1045), this consideration would be most meaningful in not permitting juries to grant such large awards as to damage the financial position of the defendant employer.[17] We strongly suggest that the jury be instructed that:

> [t]he fact finder must be guided by more than the defendant's net worth. [Plaintiffs] do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Pacific Mutual, 111 S. Ct. at 1045.

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[17] For example, in 1992, Senator John Danforth (R-MO) introduced punitive fines legislation (S. 3357). As part of the relevant factors, the jury would be instructed to consider "the effect of the punitive fine on the economic viability of the defendant," and also "the losses of employment that might occur as a result of the assessment." 138 Cong. Rec. S17041 (daily ed. Oct. 5, 1992).

C. Societal or Personal Views About the Defendant Should Not Be Considered In Punitive Damages Awards

Juries should be instructed that in determining the amount of punitive damages, they should consider only the facts of the particular case in light of the specific factors given in the court's jury instructions. Personal or societal opinions about the popularity of the defendant should not be considered. *IBEW v. Foust*, 442 U.S. at 50 n.14.

D. *Respondeat Superior* is Not an Appropriate Sole Basis for Punitive Damages Awards Against Employers. The Unwarranted Generalizations of the Court Below Concerning "Corporate Bureaucracies" Are Outrageous and Were Improperly Considered In Setting Punitive Damages Standards

In explaining its "really stupid/really mean" standard, the court below made totally unwarranted and completely unsupported accusations against corporate officials. The court invented corporate bureaucracies in which officials foment turmoil and litigation in order "to maximize upward mobility for middle management . . . and to augment the work that the bureaucracy is responsible for doing." Pet. App. at 37a, citing *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). In its search to find something "really stupid," the court below could begin with its own remarkable declaration that:

> The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.)

(Pet. App. at 37a). This shocking, unjustified generalization demonstrates that this Court's concern in *Gertz v. Welch* (418 U.S. at 350) about "selectively" using punitive damages to punish unpopular defendants was

right on the mark. As discussed more fully below, EEAC's member companies have adopted internal policies strongly condemning employment discrimination, and many have internal complaint procedures to root out and prevent improper conduct.

If juries were to apply the same concocted generalizations about corporate defendants used by the court below, employers would be extremely vulnerable to liability for punitive damages based upon the doctrine of *respondeat superior*, even though an employer had no reason to know of the unlawful conduct and certainly would not have condoned it if it had, and even if the employer had taken steps to prevent it. Few claims of intentional discrimination are the result of a vote of the corporate board of directors.

On the contrary, personnel decisions often are made by an employee with supervisory authority, but at a level much below the chief executive officer. Similarly, harassment claims normally originate from the offensive behavior of a supervisor, a co-employee or even a non-employee—the conduct of an individual, not corporate management. Supervisory misconduct should not be the basis for punitive damage awards against an employer when the individual supervisor acts without authorization, where the misconduct is contrary to company policy, where the company had no way of knowing of the misconduct, where the misconduct is not condoned, or where the company acts to discipline the supervisor or provide an avenue of recourse to the victim.

E. Even If Punitive Damages Can Be Awarded in Employment Cases, This Court Should Adopt Standards That Credit Empioyer Efforts To Prevent Discrimination as Mitigating Factors

1. *The Jury Should Be Instructed To Consider Favorably Employer Programs Designed To Prevent Discirmination*

This Court previously has held, in the sexual harrassment context, that employers cannot always be held strictly liable for the actions of supervisors. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule is equally, if not more, relevant to liability for punitive damages. As Chief Justice Rehnquist has observed, punitive damages are rationalized as punishment, as deterrence, and as a "bounty" to encourage litigation. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Where an employer has made substantial efforts to prevent the harm complained of, none of these purposes is served by a punitive damages award against that employer.

Thus, standards are necessary to establish when, if ever, an employer may be liable for punitive damages based upon the doctrine of *respondeat superior*. While such standards are imperative now because employers may be vulnerable to punitive damages under state law, *see* discussion pp. 13-15. *supra*, they will be crucial if legislation is enacted to allow recovery of unlimited punitive damages under Title VII and the Americans with Disabilities Act.[18]

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[18] An example of such mitigating factors can be found in the recent 1991 amendments to the New York City Human Rights Law, Chapter 5, 38-107, 13(d)(1). As mitigating factors for the amount of civil penalties, the Commission can consider whether the employer:

> (1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:
>
> > (i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees,

The sexual harassment context provides a particularly appropriate model for examination. Sexual harassment in the workplace can occur in two circumstances: "quid pro quo," where the offender is in a position of authority and ties acceptance of sexual advances to advancement or other economic benefits, and "hostile environment," where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11(a)(3)). The federal courts consistently have held employers strictly liable in cases of "quid pro quo" harassment by supervisory employees. *Id.* at 72.

As noted above, however, this Court has refused to hold employers automatically liable in "hostile environment" cases where the offender is a supervisor, and thus presumably would not do so where such an environment was created by a co-employee. The Court suggested mitigation factors such as: (1) the existence of a specific policy prohibiting sexual harassment; (2) whether the policy is communicated to employees in a manner that encourages them to report harassing behavior; (3) whether and when the employer learned of the misconduct; and (4) if the employer's response was adequate. *Id.* at 72-75.

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agents and persons employed as independent contractors, and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices . . . .

Accordingly, federal courts since *Vinson* have based their decisions on these factors.[19] Thus, if an employer can demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

There may be situations, however, where an employer took reasonable steps to promote and implement an anti-harassment policy but was unsuccessful in preventing harassing behavior in a particular case. For example, a supervisor might ignore company policy and request sexual favors in exchange for a promotion recommendation. A co-employee with full knowledge of the company's policy could refuse to take it seriously and continue to harass another worker. If an employer is held strictly liable for "quid pro quo" harassment or falls short of the necessary proof to avoid "hostile environment" liability, the victim may be entitled to damages from the individual perpetrator under Title VII.

It does not follow, however, that an employer should also be liable for punitive damages under these circumstances. Punitive damages are intended to punish wrongdoers and deter future unlawful conduct. If an employer has devoted substantial effort to implementing an anti-harassment policy but was unable to prevent the disobedience of an errant employee, it would serve no purpose to punish the employer. Thus, in cases where punitive damages are available, the employer's efforts should be considered as negating, or at least mitigating against, such an award. At the very least, the charge to the jury should direct the jury to take the employer's efforts into account.

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[19] *See, e.g., Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984) (same); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir. 1992), *cert. denied*, No. 92-700, Dec. 14, 1992 (same); *Scherer v. Rockwell Int'l*, 975 F.2d 356 (7th Cir. 1992).

For example, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated that policy to supervisors and rank-and-file alike, and has indicated its intent to punish those who disobey, should be relevant to show that the company does not condone harassment. Thus, such evidence should distinguish and separate the company's liability from that of an individual supervisor or employee who in effect has engaged in unauthorized, willful misconduct. Indeed, imposing punitive damages against the employer in this situation would be nothing more than improperly dipping into an innocent "deep pocket."

2. *The Jury Should Be Instructed That A Victim's Failure to Use the Employer's Internal Grievance Procedure Mitigates Against Punitive Damages*

Likewise relevant is evidence that the company's policy encouraged employees to report incidents of discrimination or harassment, including methods to bypass the direct supervisor if that person is also the harasser. An employee's failure to come forward to take advantage of the anti-harassment policy must then negate or mitigate against a punitive damages award. The plaintiff's refusal to make use of an available recourse that could have effectively remedied the situation must be taken into consideration in mitigation of a punitive damages award.

In addition, where the affected employee does not make use of an anti-harassment policy and the employer has no reason to know that harassing behavior s occurring, the employer's lack of knowledge must also be considered a mitigating factor. In this situation, punitive damages are particularly inappropriate. Without actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect itself from actions contrary to company policy, even if it has a comprehensive anti-harassment policy. Punitive damages would serve no purpose, since there is no employer conduct to be deplored and deterred.

3. *An Employer's Attempt to Investigate and Remedy Misconduct Should Mitigate Punitive Damages*

Finally, the conduct of an employer who *is* informed of harassing behavior is extremely relevant to mitigation of any punitive damages award. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and bona fide investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d).

It also could be argued that an employer who conducts a complete investigation and reaches a well-supported, reasonable judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should receive credit for its good faith efforts even if a trier of fact later disagrees with its conclusion.

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Thus, as the purpose of punitive damages is to punish a wrongdoer and deter future unlawful conduct, it stands to reason that such awards should be severely limited, if not forbidden, when an employer made a good faith effort to prevent the unlawful conduct but its effort was unavailing. Accordingly, this Court should reject any *per se* rule that would allow a jury unrestricted discretion to award punitive damages solely on the basis of *respondeat superior*. Instead, if the Court finds that such awards are appropriate under any circumstances, it should adopt reasonable standards, including taking into account employer efforts to pre-

vent unlawful behavior by subordinates as mitigating factors.[20]

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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January 21, 1993

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[20] Another favorable approach to controlling punitive damages was suggested by Justice O'Connor in *Pacific Mutual*, 111 S. Ct. at 1064. The trial could be *bifurcated* into liability and punitive damages stages. This approach makes it easier to impress upon the jury that a higher degree of evidence is necessary to support punitive damages awards. *See also* S. 3357, Senator Danforth's punitive fines bill that provided for bifurcated proceedings (138 Cong. Rec. S17041 (daily ed. Oct. 5, 1992)).

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On a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF AMICI CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE, THE ALLIANCE OF AMERICAN INSURERS, THE ASSOCIATION OF CALIFORNIA LIFE INSURANCE COMPANIES, THE HEALTH INSURANCE ASSOCIATION OF AMERICA, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

This brief addresses the following question:

Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

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INTERESTS OF THE AMICI

The *amici* are trade associations representing the interests of many of the life, health and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance, the largest life in-

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[1] Counsel for both the Petitioner and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

surance trade association in the United States, represents the interests of 611 member life insurance companies; these companies currently underwrite 95 percent of the life insurance in force in legal reserve life insurance companies in the United States. The Alliance of American Insurers represents approximately 180 insurance companies that write property and casualty insurance nationwide, with annual premiums representing over ten percent of such insurance. The Association of California Life Insurance Companies represents the interests of 40 member companies that write the vast majority of life and disability insurance in California. The Health Insurance Association of America represents the interests of 260 member companies that provide approximately 70% of the fully insured commercial health insurance in the United States. The National Association of Independent Insurers, the largest association of property and casualty insurers in the country, represents over 560 property and casualty insurers writing over one-quarter of the property insurance sold in the United States.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the *amici's* members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers, often in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational, objective relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. Because of their genuine interest in the constitutionality of current punitive damages law, therefore, the *amici* have filed briefs in this Court in prior cases involving this issue. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief presents to the Court the views of the *amici*, based on the experiences of their broad-based constituencies, on one of the issues in this case: whether the excessive and disproportionate nature of the $10,000,000 punitive damages award violated TXO's substantive due process rights.

STATEMENT

1. Because Petitioner sets the facts forth fully in its brief, the *amici* only summarize the facts here. In late 1984, TXO Production Corp. ("TXO") became interested in the oil and gas rights in land known as the Blevins Tract (Pet. App. 7a). Tug Fork Land Company ("Tug Fork") managed the Blevins Tract (*id.*). Tug Fork had previously leased the land's oil and gas development rights to George King, who in turn had leased the rights to Alliance Resources Corporation ("Alliance") (*id.*). In early 1985, TXO and Alliance reached an agreement concerning the oil and gas rights in the Blevins Tract (*id.* at 8a). TXO then retained a law firm to examine the title to the Blevins Tract (*id.* at 9a). The title report disclosed an apparent problem with a 1958 deed (*id.*). TXO obtained and recorded a quitclaim deed (*id.* at 11a).

2. In August 1985, TXO filed an action for a declaratory judgment to quiet title (Pet. App. 12a). Respondents counterclaimed, alleging slander of title (*id.*). The court bifurcated the issues for trial (*id.*). In the declaratory judgment action, the court found that there was no defect in the title (*id.*). On the counterclaim, a jury found for respondents and awarded $19,000 in compensatory damages—which represented solely attorneys' fees (*id.* at 20a)—and $10,000,000 in punitive damages (*id.* at 12a). The court, with no explanation, denied TXO's

motion for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur (Pet. App. 56a, 74a).

3. The West Virginia Supreme Court of Appeals affirmed (Pet. App. 1a). Among other things, the court rejected TXO's substantive due process challenge to the punitive damages award (*id.* at 39a-40a). In doing so, the court specifically stated that, "because appellant and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur" (*id.* at 7a). The court then announced general guidelines for determining whether a punitive damages award was unconstitutionally excessive, concluding that it would not apply to this case its recent decision in *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), which established numerous factors for punitive damages review in light of *Pacific Mutual Life Ins. Co. v. Haslip*. The court delineated three categories of defendants: (1) "really stupid" defendants, (2) "really mean" defendants, and (3) "really stupid defendants who could have caused great harm but who actually caused minimal harm" (*id.* at 35a-36a). The court then stated that a ratio of five to one (punitive damages to compensatory damages) was roughly the limit for the really stupid defendants, while a ratio of even 500 to 1 was not excessive for the really mean defendants (*id.* at 38a-39a). Finding that TXO belonged in the "really mean" category (*id.* at 39a-40a), the West Virginia Supreme Court of Appeals found that the $10,000,000 punitive damages award was not excessive, even though it was 526 times the compensatory damages.

SUMMARY OF ARGUMENT

A. In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court recently reaffirmed the rule that the Due Process Clause imposes substantive limits on the amounts of punitive damages that civil juries can award. The Court held that punitive damages are not

per se constitutional; it also specifically noted that punitive damages can "run wild." *Id.* at 1043. To be constitutional, punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 1045. This substantive due process analysis is based in the jurisprudence of this Court. The decision in *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851), which clarified the functions of punitive damages, and the subsequent adoption of the Fourteenth Amendment in 1866, which permitted federal courts to review state action under due process principles, laid the groundwork for substantive review of the amounts of extra-compensatory damages. Nearly a century ago, this Court began to review extra-compensatory damages in light of their deterrent and punitive purposes to determine whether they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

B. While it is clear that the Due Process Clause imposes substantive limits on the size of punitive damages awards, the appropriate method for evaluating punitive damages under substantive due process principles is more elusive. This Court's decisions, however, demonstrate that determining whether a particular punitive damages award is constitutionally excessive involves an evaluation of both the competence of the institution that awards punitive damages and the rationality of these awards in light of their purposes.

1. The level of scrutiny of punitive damages awards under the Due Process Clause should depend, in part, on whether the jury rendering the award did so within meaningful bounds. This Court has made clear that the states' reasoned choices deserve considerable judicial deference. Politically accountable legislatures are well suited to the task of advancing a state's legitimate punitive and deterrent goals through appropriate legislation. To the ex-

tent that civil juries award extra-compensatory damages within such a framework, either legislatively or judicially established, therefore, those awards serve to enforce state choices and thus embody an institutional legitimacy warranting some deference. But jury awards rendered in the absence of such guidance have no comparable institutional legitimacy; juries merely examine isolated facts relating to a specific past incident and thus are unlikely to provide an award that will serve the states' broad forward-looking policy goals. Such unbridled jury awards are thus not entitled to any special deference.

2. Of course, jury awards of punitive damages that bear a rational relationship to the states' legitimate goals of deterrence and punishment may meet the due process test notwithstanding the absence of any legislative guidance. Without legislative guidance, however, analysis of the excessiveness of the award should be—as it was in *Pacific Mutual Life Ins. Co. v. Haslip*—fairly stringent and based on objective factors so as to ensure that the award rationally serves its dual purposes. Whether punitive damages awards are constitutionally excessive should turn, in the first instance, on whether the award rationally serves its deterrent purpose. To this end, courts may evaluate the jury's award for excessiveness using the amount of a defendant's actual or anticipated gain from his misdeeds and, in some cases, the plaintiff's reasonable litigation costs as appropriate objective indicia of a rational deterrence-based award.

This deterrence-based measure may, in some cases, underserve or overserve the second role that has been advanced in support of punitive damages, which is punishment. In such cases, courts can adjust the deterrence-based award to a level that rationally serves the punitive purpose as well. Courts may examine objective factors—such as whether a punitive damages award bears a rational relationship to a plaintiff's actual harm, as evidenced by the compensatory damages awarded, and

whether the award exceeds criminal or civil penalties for comparable conduct—in order to determine the appropriate "punitive" adjustment to the deterrence-based measure. This purpose-oriented, objective analysis ensures that, consistent with the Court's substantive due process principles, extra-compensatory awards will bear a rational relationship to their purposes without violating the constitutional rule against excessiveness.

3. This analysis makes abundantly clear that the punitive damages award in this case, rendered in the absence of any legislative guidance, rationally serves neither purpose. It exceeds any objectively-based deterrence measure of punitive damages. And it greatly exceeds any objectively-based amount that might fairly serve to "punish" TXO. It is, therefore, constitutionally excessive.

ARGUMENT

JURY AWARDS OF PUNITIVE DAMAGES IMPOSED IN AMOUNTS BEARING NO OBJECTIVE, RATIONAL RELATIONSHIP TO THE PURPOSES OF DETERRING AND PUNISHING A CIVIL DEFENDANT'S CONDUCT ARE CONSTITUTIONALLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE

The Fourteenth Amendment imposes limits on state legislative and judicial actions. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Where those actions exceed the limits of substantitve due process, it is the responsibility of this Court to uphold the requirements of the federal Constitution. While it is obviously a difficult and delicate area—so that this Court's recent caution is fully understandable—only this Court can firmly establish the limits that the Constitution places on punitive damages law. The decision in *Pacific Mutual Life Ins. Co. v. Haslip* began the process of setting constitutional guidelines, but it has left a mass of confusion in its wake. *See generally* W. H. Volz & M. C. Fayz, *Punitive Damages and The Due Process Clause: The Search for Constitutional*

Standards, 69 U. Det. Mercy L. Rev. 459 (1992). This brief thus urges the Court to set forth meaningful, objective standards for determining when punitive damages awards exceed the constitutional limit.

A. The Due Process Clause Imposes a Substantive Limitation on the Amounts of Punitive Damages That Civil Juries Can Award

1. This Court acknowledged the substantive, purpose-driven limitation on punitive damages awards in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1043-46. That limitation, however, is not new. It is well-grounded in history. Thus, in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), this Court observed that "[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." And, it added, "where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff . . . something farther by way of punishment or example." *Id.*

This Court's decision in *Day*, and the subsequent adoption of the Fourteenth Amendment in 1866, marked important steps in punitive damages doctrine. The Court in *Day* clarified the purposes justifying punitive damages awards as deterrence and punishment.[2] The subsequent

[2] *See also Milwaukee & St. Paul R.R. v. Arms*, 91 U.S. 489, 492-93 (1876). The Court has continued to identify deterrence and punishment as the principal purposes underlying punitive damages, as have the great majority of jurisdictions. *See Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991); *see also* 1 J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 4.14 (1992); J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1126 (1984); Restatement (Second) of Torts § 908(1) (1979).

adoption of the Fourteenth Amendment gave federal courts the responsibility to evaluate whether state actions actually served these purposes or, on the contrary, violated "due process of law." The Fourteenth Amendment thus brought courts into the process of meaningful, purpose-based review of the amounts of extra-compensatory damages.

In the early part of this century, the Court began to review extra-compensatory damages awards under the Fourteenth Amendment to determine whether they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *see also Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913). Under the "gross excessiveness" test, the Court independently evaluated whether the awards properly served the purposes—and in particular, the deterrent purpose—of those extra-compensatory damages. *See St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. 63, 67 (1919) (justifying penalty in light of "the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates"); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111 (justifying large award because the defendant's illegal business "was very extensive and highly profitable"); *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885) (noting that legislation served as "the most efficient mode of preventing . . . the commission of injuries" and as an important incentive for victims to seek redress). In this manner, the Court determined whether these awards were "wholly disproportioned to the offense and obviously unreasonable." *St. Louis Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66-67. *See also Missouri Pacific Ry. v. Tucker*, 230 U.S. at 351 (Court struck down jury award as "grossly out of propor-

tion to the possible actual damages" and "arbitrary and oppressive"). This would seem to be essentially the same issue as that involved here.

2. In *Pacific Mutual Life Ins. Co. v. Haslip*, this Court again confronted an extra-compensatory damages award. While ultimately concluding that the punitive damages award was not excessive, this Court engaged in a lengthy and searching review to ensure that the award properly served the dual purposes of deterrence and punishment. 111 S. Ct. at 1043-46. The Court approved the Alabama system for evaluating punitive damages—a system that looks to a combination of several objective factors, including, for example, the costs of litigation and the defendant's profit from his misdeeds. The Court also examined the ratio of punitive damages to compensatory damages, concluding that a ratio of approximately four to one was "close to the line" of constitutional impropriety. *Id.* at 1044-46.[3] Thus, both history and the recent decision in *Pacific Mutual Life Ins. Co. v. Haslip* demonstrate that the Due Process Clause prohibits excessive punitive damages awards. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86; *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340.

B. Punitive Damages Awards Exceeding Amounts Rationally and Objectively Related to the Purposes of Deterrence and Punishment Are Constitutionally Excessive

The conclusion that the Due Process Clause of the Fourteenth Amendment encompasses a substantive rule against excessive punitive damages awards in civil cases does not end the inquiry. Rather, that conclusion necessarily leads to a more difficult examination of the contours of the

[3] The Court in *Pacific Mutual Life Ins. Co. v. Haslip* also examined the ratio of punitive damages to out-of-pocket expenses, concluding that a ratio of approximately 200 to one was "close to the line." 111 S. Ct. at 1046.

substantive rule. While the Due Process Clause is not susceptible to rigid tests (*see Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981)), this Court's substantive analysis of state laws under due process principles—reflecting both a deference to state choices and a requirement that the law meet its purposes—provides appropriate guidance here. Determining whether punitive damages awards are constitutionally excessive, therefore, requires an evaluation of (1) the competence of the institution that awards punitive damages, and (2) the rationality of these awards in light of their purposes.

1. One factor in judicial scrutiny of punitive damages awards is the level of guidance provided to the jury. While examination of punitive damages awards for excessiveness under due process principles must be made with due regard for state choices made by a state legislature, no comparable deference need be rendered to jury awards in the absence of such guidance. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 267, 281 (1989) (Brennan, Marshall, JJ., concurring).

The states plainly have legitimate interests in deterring and punishing certain misconduct against their citizens. When the states have acted to further these goals in their criminal statutes, this Court has recognized that the states' policy choices merit substantial deference:

> "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy."

Gregg v. Georgia, 428 U.S. 153, 175-76 (1976) (citations omitted); *see also Weems v. United States*, 217 U.S. 349, 379-80 (1910).

When the states act to advance these same goals through their civil statutes, this Court has accorded simi-

lar deference to the states' legislative judgments, while recognizing that there are constitutional limits to legislative power. Thus, in reviewing an assessment of a civil statutory fine in *Waters-Pierce*, this Court stated:

> The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.

212 U.S. at 111; *see also St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66.

Both the deference and the limitation are appropriate. *See* G. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 147 (1982). When civil juries award punitive damages within a rational and appropriately limited framework, those awards give effect to state choices as to the amount of punitive damages and will, generally, serve the purposes of deterrence and punishment. *See Waters-Pierce Oil Co.*, 212 U.S. at 111; *Missouri Pacific Ry. v. Humes*, 115 U.S. at 522 (noting that "the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion").

Jury awards of punitive damages rendered in the absence of such legislative guidance, in contrast, embody no such institutional legitimacy. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 281 (Brennan, Marshall, JJ., concurring). Juries do not speak with the same effect as democratically elected, politically accountable legislatures. The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions. Quite the contrary, juries face individualized facts and are particularly ill-equipped to take into account the broad impact of a punitive award on others and thus to determine when

a penalty furthers the state's legitimate goals. *See, e.g.*, J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 (1984); D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).[4]

Thus, while courts generally defer to the deliberative function of juries and to the verdicts that they reach, jury awards in civil cases are not inviolate—particularly where juries act free from legislative constraints. Indeed, this Court has noted, in another context, that "[i]f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial." *Linn v. United Plant Guard Wkrs., Local 114*, 383 U.S. 53, 65-66 (1966) (emphasis added); *see also Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 276-77. Exercising that duty does not unduly interfere with a state's legitimate interest in deterrence and punishment. Rather, this judicial review merely recognizes the jury's lack of institutional competence in advancing these interests, through arbitrary punitive damages awards, and

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[4] Professor Clarence Morris was far-sighted when he explained this issue almost sixty years ago. He wrote:

> In determining whether or not the defendant has been a "reasonably prudent man" or an "intentional wrongdoer," the jury's task is to reflect the social values of the community; the jury evaluates the defendant's past behavior, it determines whether or not his past conduct should be condemned. But in fixing the amount of punitive damages the considerations all look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future? Evaluation of past conduct is a different type of problem from control of future behavior. It is evident that problems of social control may require more technical skill than jurymen have or can acquire. Probably, many on jury panels cannot think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punisnment as legal, justifiable revenge.

C. Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

respects the role that courts must play in ensuring due process.[5]

2. Even in the absence of legislative guidance, punitive damages awards that bear a rational relationship to the purposes of deterrence and punishment may not be so excessive and arbitrary as to deprive a defendant of due process of law. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1046; *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 67. Without legislative guidance, however, the courts must—as this Court did in *Pacific Mutual Life Ins. Co. v. Haslip*—conduct a thorough, objective analysis of the award in light of its purposes. 111 S. Ct. at 1044-46; *see also id.* at 1055 (Kennedy, J., concurring) (noting the majority's "detailed examination" of the Alabama punitive damages system). Indeed, in finding that the award in *Pacific Mutual Life Ins. Co. v. Haslip* was not excessive, this Court favorably pointed out the objectivity of the factors that the Alabama courts analyzed when examining punitive damages awards. *Id.* at 1044-46. By requiring courts to conduct an objective analysis of whether certain amounts of punitive damages are rationally related to their purposes—and, in particular, the purpose of deterrence—this Court can provide a workable and appropriate test of excessiveness that will protect against arbitrary and irrational punitive damages awards.

a. Examining the substantive contours of punitive damages law in light of its deterrent purpose is not a new concept. Nearly a century ago, this Court emphasized the deterrent function of extra-compensatory damages in reviewing them for "excessiveness" under the Due Process Clause. *See St. Louis, Iron Mountain & So. Ry.*

[5] Judicial scrutiny of jury awards likewise does not interfere with the jury's function under the Seventh Amendment. *Cf. Tull v. United States*, 481 U.S. 412, 425, 427 (1987) (Seventh Amendment does not require a jury to determine the amount of the "remedy" in a civil case, and "a determination of a civil penalty is not an essential function of a jury trial").

v. Williams, 251 U.S. at 67; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111; *Missouri Pacific Ry. v. Humes*, 115 U.S. at 523. More recently, this Court has given weight to this deterrent purpose in determining the availability of punitive damages in certain types of cases. The Court has found the risk of overdeterrence too great to justify awards of punitive damages against unions in "duty of fair representation" cases. *See International Bhd. of Elec. Wkrs. v. Foust*, 442 U.S. 42, 51-52 (1979). And, recognizing deterrence as a major objective of both punitive damages law and section 1983, the Court has found that allowing these damages against municipalities, as opposed to individual officials, would not advance that purpose. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-270 (1981). This Court's emphasis on the deterrent function of punitive damages thus provides an appropriate guide, in the first instance, for defining the scope of the constitutional rule against excessiveness. Under a deterrence-based approach, an extra-compensatory award that exceeds an amount necessary to deter a defendant (and other potential defendants) from engaging in similar misconduct in the future is, in all likelihood, constitutionally excessive.

Assessing whether an award of punitive damages exceeds an amount necessary to deter a defendant should—in order to ensure rationality—turn on relatively objective factors. The amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045 (in approving Alabama punitive damages analysis, Court noted that one of the many factors that Alabama courts look to is the "profitability to the defendant of the wrongful conduct"); *see also* D. Dobbs, *Ending Punishment In "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989); D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1286. The defendant's profits from his misconduct—or, in some

cases, the expected profits where the defendant fails to profit as expected—are objectively-based and often ascertainable without substantial difficulty. Removing the actual or expected gain, in addition to requiring the defendant to compensate the plaintiff for his actual losses, makes it less likely that the defendant will repeat the conduct. A gain-based measure of this sort sends a clear signal to defendants and, thus, will often fully serve the deterrent function.

Of course, a "gain-based" measure of extra-compensatory damages may not always adequately serve this deterrent function; it may overserve or underserve this purpose. A defendant may, for example, escape effective deterrence when its conduct is rarely challenged in private litigation—i.e., when the cost of private enforcement exceeds the plaintiff's damages. *See* J. Mallor & B. Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 650 (1980); *cf.* D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1285 (noting that the deterrent effect of punitive damages depends, in part, on "the manufacturer's perception of the likelihood of his being identified and punished"). In such a case, an appropriate measure of deterrence may include the plaintiff's reasonable litigation costs, to the extent not otherwise provided by statute. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045 (in approving Alabama punitive damages analysis, Court noted that one of the many factors Alabama courts look to is "all the costs of litigation"); *see also* D. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. at 890-94. Shifting the plaintiff's reasonable litigation costs to the defendant in these types of cases could achieve appropriate deterrence by encouraging otherwise uneconomical litigation and, at the same time, removing the defendant's incentive to continue his misconduct. This measure, as with the gain-based measure, is relatively objective and, given the courts' experience with assessing attorneys' fees, hardly unfamiliar.

Evaluating the amounts of extra-compensatory damages based on these relatively objective measures thus achieves the deterrent function of these damages without a substantial risk of overdeterrence from grossly excessive awards. This evaluation does not require a court to defer to the jury's subjective assessment of the amount necessary to deter future misconduct—an assessment that has led to a concern about punitive damages that "run wild." Rather, it permits a court to review a jury's extra-compensatory award based on objective factors that serve to approximate what will adequately deter defendants from future misconduct within constitutional limits.

b. Deterrence, however, is not the sole function of punitive damages. This Court has made clear that they function as "punishment" as well. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 275; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 266-67. While extra-compensatory damages based on a deterrence-based measure will often serve simultaneously to deter and punish, there may be cases in which such a measure underserves the punitive function—as, for example, where a defendant expects no gain from his misconduct. In such cases, adjusting an extra-compensatory award to serve its punitive purpose may be necessary. *Cf.* D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1317 ("[t]he punishment function is the final factor to be considered in developing a standard for the measurement of punitive damages").

Whether a defendant "deserves" punishment beyond an amount necessary to deter his future misconduct turns on the gravity of his misdeeds. *See* D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 6 (1982). In *Pacific Mutual Life Ins. Co. v. Haslip*, this Court noted that the proper benchmark is whether the punitive damages awards "are not grossly out of proportion to the severity of the offense and have some

understandable relationship to compensatory damages." 111 S. Ct. at 1045. *See also Missouri Pacific Ry. v. Tucker*, 230 U.S. at 351 (noting that liquidated damages scheme was "grossly out of proportion to the possible actual damages"). Whether an extra-compensatory award properly serves its "punitive" function, therefore, depends on whether it bears a rational relationship to the defendant's conduct, measured with reference to such objective factors as the compensatory damages awarded and any legislative penalties for similar misconduct.

Though the Due Process Clause may not require punitive damages awards to represent exact multiples of compensatory, or actual, damages, punitive damages that are many times these damages raise, at a minimum, a serious concern that they overserve the punitive function. Indeed, this Court noted in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1046, that a punitive damages award more than four times the amount of compensatory damages "may be close to the line" of constitutional impropriety. *Cf.* C. R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1273 (1987) ("[a]n award of two to three times actual damages might be thought presumptively within the constitutional limits"). Several states have enacted statutes that limit to varying degrees punitive damages awards to amounts that are some low multiple of the plaintiff's actual damages, reflecting a reasoned judgment that any greater amount would not further the states' legitimate interests. *See, e.g.*, Colo. Rev. Stat. § 13-21-102 (1987); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73 (1) (West Supp. 1992); Nev. Rev. Stat. Ann. § 42.005 (Michie Supp. 1991); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1993). *Cf.* J. Clements, Comment, *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness*, 24, St. Mary's L.J. 197, 206-09 (1992) (summarizing various state legislative responses to punitive dam-

ages). It is thus reasonable to conclude that, as a general benchmark, an award within a relatively low multiple of compensatory damages—like the four to one multiple in *Pacific Mutual Life Ins. Co. v. Haslip*—would give adequate recognition to the "punitive" function.

This "ratio" approach is only one objective benchmark for determining what amount of extra-compensatory damages will serve the punitive purpose. What is an appropriate punishment for a defendant's misconduct may, in some cases, be apparent from legislative penalties for similar conduct. Many states have enacted statutes prescribing penalties, either civil or criminal, for certain intentional or negligent conduct that is similar to conduct that exposes a defendant to punitive damages. That legislative assessment concerning what "punishment" is appropriate serves an important role in ascertaining whether an extra-compensatory award for comparable conduct not subject to the legislative penalty is rationally related to that purpose. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 300-01 (O'Connor, Stevens, JJ., concurring in part and dissenting in part); *cf. Weems v. United States*, 217 U.S. at 380-81; *Pacific Mutual Life Ins. Co. v Haslip*, 111 S. Ct at 1046 (while declining to accord conclusive weight to analogous legislative fines, Court examined the Alabama legislative penalty for comparable conduct).

It is of course true that "the Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987). These objective factors are thus only guides, and there may be other appropriate objective factors. But, when applied as a check against punitive damages, these factors should ensure that punitive damages, when warranted at all, adequately—and rationally—serve both their deterrent and punitive purposes without violating the constitutional rule against excessiveness.

3. The punitive damages award in this case cannot stand under these principles. This case does not require the Court to review any legislative policy choice in West Virginia concerning the appropriate measure of extra-compensatory damages. The award in this case reflects only the decision of a West Virginia jury to assess, in the absence of any legislative guidance, a massive punitive damages award against TXO. The jury's award thus plainly did not deserve substantial deference. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 281 (Brennan, Marshall, JJ., concurring).

A purpose-based analysis—comprised of several objective factors—of the jury's $10,000,000 punitive damages award makes it plain that the award was constitutionally excessive. As an initial matter, the award greatly exceeds any deterrence-based measure of punitive damages. TXO gained nothing from its misconduct, and it is difficult indeed to find any anticipated gain. In any event, surely such anticipated gain could not have approached $10,000.000. And respondents' litigation costs amounted to only $19,000. A deterrence-based measure would thus not come close to $10,000,000. Further, assuming that the deterrence-based measure underserved the punitive purpose of punitive damages here, the objective factors under the punitive analysis demonstrate as well the excessiveness of the award. Calculation of a low multiple of respondents' compensatory damages, *i.e.*, a low multiple of $19,000, would come to only a very small percentage of $10,000,000. Indeed, the punitive damages award here is 526 times greater than the compensatory damages award.

Instead of analyzing the amount of the award with reference to several objective factors in order to ensure that the award rationally served its purposes, the West Virginia Supreme Court of Appeals set forth guidelines that are purely subjective and that invite only irrational results. The West Virginia court delineated three categories of defendants: "really stupid" defendants, "really

mean" defendants, and "really stupid defendants who could have caused great harm but who actually caused minimal harm." Proper placement in a category is critical under West Virginia's scheme. For the "really stupid" defendants, the West Virginia court found the outer limit ratio of punitive damages to compensatory damages to be roughly five to one. For the "really mean" defendants, however, the West Virginia court provided no proportional limit whatsoever, stating instead that a ratio of even 500 to 1 was not necessarily unconstitutional. Despite the drastically disparate consequences of being in a particular category, however, even the West Virginia court acknowledged that fact patterns might fall within both categories (Pet. App. at 36a n.11).

This system of analyzing the constitutionality of punitive damages awards makes a mockery of the Due Process Clause and this Court's interpretations of it.[6] At a minimum, the lack of any proportional limit for the "really mean" defendant does not square with this Court's teachings in *Pacific Mutual Life Ins. Co. v. Haslip*, much less the principles of proportionality that the Court has previously endorsed. Indeed, in *Pacific Mutual Life Ins. Co. v. Haslip*, this Court found that a ratio of four to one was "close to the line" of constitutional impropriety, based on a fact pattern that would seem clearly to fall within the "really mean" category in West Virginia, since it involved intentional fraud. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1046. This finding is plainly at odds with the West Virginia court's conclusion that a ratio of even 500 to 1 for the "really mean" category—whatever that is—would not be unconstitutional.

The punitive damages award of $10,000,000 against TXO plainly lacked "objective criteria," the mode of analysis that this Court approved in *Pacific Mutual Life*

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[6] Indeed, two justices of the West Virginia Supreme Court of Appeals noted that the majority's categories were "ridiculous" (Pet. App. 53a-54a).

Ins. Co. v. Haslip. The court below did not analyze—in contrast to the courts in Alabama—a combination of several objective factors to determine whether the $10,000,000 award rationally served the purposes of deterrence and punishment. And it did not do so despite the fact that its seminal post-*Haslip* case, *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), delineated a combination of objective factors that "are interactive and must be considered as a whole when reviewing punitive damages awards" (Pet. App. 33a-35a). They key, therefore, is the balance of objective factors. The lower court's failure to balance objective factors represents a failure to abide by *Pacific Mutual Life Ins. Co. v. Haslip* and its own prior interpretation of that case, resulting, unsurprisingly, in a skewed award. The West Virginia court likewise failed to analyze whether the award was so disproportionate to the respondents' compensatory damages as to be constitutionally excessive. If the punitive damages award in *Pacific Mutual Life Ins. Co. v. Haslip* was close to the line—taking into account the purposes of deterrence and punishment—then the award here must have crossed that line.

In practical terms the problems here may be summarized.

1. Under our federal system, the law of torts, including damages for torts, is essentially a matter of State law. The Court is understandably reluctant to make decisions that will convert tort cases—or at least state court cases involving punitive damages—into "federal cases," thus shifting substantially the balance between the state and federal courts in the tort field.

2. The Court also has legitimate concerns about its own case load. Understandably, it does not welcome a decision that would bring a large number of State tort cases here for review. Having in mind its resources and

its other responsibilities, it could review only a tiny percentage of such cases. This would have little impact on the overall problem.

In this situation, the Court has sought to urge the State courts to accept the fact that application of the Due Process Clause in tort cases is as much the responsibility of the State courts as of this Court. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). It has made general statements about Due Process limitations, hoping that its limits will be taken seriously, but, in the modern era, it has not reversed any decision in this area. It has spoken clearly, but it has not put teeth behind its words. Unfortunately—but not surprisingly, considering the forces which operate in this area—this approach has not worked, as this case abundantly shows. The time has come when this Court should take clear action, by reversing the decision below in this case. Of course, the question is one of degree, but it is none the worse for that. The law of torts is full of questions of degree. Most of them are unlikely to involve the federal Constitution. But somewhere there is a line where punitive damage awards become unconstitutional under the Due Process Clause. If there is such a line—and there surely is—this case has gone beyond it.

A reversal here would have a sobering and a salutary effect, particularly if it is accompanied by a statement of rules—perhaps including outside numerical multiples—that would be of assistance to the State courts in meeting their responsibilities under the federal Constitution. *Cf. Miranda v. Arizona*, 384 U.S. 436 (1966). With such rules established under the federal Constitution—which is this Court's special concern—perhaps any volume of appeals brought here could be handled generally by *per curiam* decision. With a suitable number of these, State courts could come to know the appropriate limits and know that they are real and will be enforced, with

the result that the volume of appeals here could be kept under control. This Court need not be and should not be a National Court of Tort Appeals, but it inescapably has the responsibility of establishing and enforcing appropriate limits under the federal Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE BUSINESS COUNCIL OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae will address the following issue:

Whether the continued pattern of excessive punitive damage awards after *Pacific Mutual Life Ins. Co. v. Haslip* requires articulation of more definite standards for determining whether a jury verdict satisfies Due Process.

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BRIEF OF THE BUSINESS COUNCIL OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS *

The Business Council of Alabama is a non-profit association of 2,200 businesses of all sizes and types, such as grocers, dry cleaners, restaurants and hardware stores, as well as utilities, manufacturers and insurers. Its members conduct business in every Alabama county, and face demands for punitive damages every day. In a state where such damages can and often do reach into the millions of dollars, punitive awards have a profound impact upon the economic stability of business.

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* The parties' letters of consent to the filing of this brief have been filed with the Clerk of the Court.

Despite the Court's mandate in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), disparate punitive awards continue to be rendered and affirmed in Alabama on a scale exceeding pre-*Haslip* levels. The Alabama model for post-verdict review is not having the effect *Haslip* envisioned. To assist the Court in determining whether further standards are needed, *amicus* brings to the Court a summary of Alabama's post-*Haslip* experience. It also suggests a proposal for improved trial and appellate standards in the imposition of punishments.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If this Court is to consider the effectiveness of the Alabama model for post-verdict review of punitive damages envisioned in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), common sense suggests the wisdom of reviewing Alabama's post-*Haslip* experience.[1] A review of Alabama trial and appellate results since March 4, 1991, reveals a troubling line of cases which either misapply *Haslip's* Due Process requirements or reject them altogether.

The Alabama model is ineffective. Punitive awards during the twelve months following *Haslip* reached an

[1] In *Haslip* this Court held that Alabama's jury instructions, in conjunction with its independent post-verdict review at both the trial and appellate stage, satisfied minimum procedural Due Process requirements. This post-verdict scheme, which we refer to as the "Alabama model," contemplates independent review of a punitive award in light of the following "Green Oil" factors, so-named because of their adoption in *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala. 1989):

> (a) the relationship between punitive damages and the defendant's conduct; (b) the degree of reprehensibility of defendant's conduct; (c) the profitability to defendant of the wrongful conduct; (d) the financial position of defendant; (e) the plaintiff's cost of litigation; (f) the imposition of criminal sanctions against defendant; and (g) the existence of other civil awards against defendant for the same conduct.

See Haslip, 111 S.Ct. at 1045.

all-time high—a staggering $200 million dollars. In a state with one of the nation's smallest populations and poorest economies, such verdicts have a sadly debilitating effect.

That punitive damages have reached epidemic proportions in Alabama is both yesterday's news and today's.[2] Two of the four modern cases in which this Court has addressed the issue originated in this state.[3] And despite the Court's gesture in *Pacific Mutual Life Ins. Co. v. Haslip*, the problem of punitive damages has worsened. This is partially due to the lack of ascertainable standards in post-verdict judicial review. The root problem, however, is that juries still are not given meaningful instructions for exercising their discretion. Imposing more post-verdict review measures is no answer. Such an approach is analogous to addressing increased highway accidents by building more hospitals.

Our message as *amicus curiae*: It is no solution to simply reverse and remand this case for compliance with the Alabama model. State courts like Alabama's have failed to come to grips with *Haslip*. Legislatures like Alabama's may be powerless to act. If any lasting solution is to be found, this Court must articulate more definite standards for Due Process in the assessment of civil punishments—both in the imposition of the verdict and in post-verdict review.

[2] Frum, *Unreformed*, FORBES, Feb. 1, 1993, at 82 (analysis of the continuing incidence of multimillion dollar punitive verdicts in Alabama).

[3] *Pacific Mutual Life Ins. v. Haslip, supra; Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

ARGUMENT

I. THE ALABAMA MODEL REVIEWED IN *HASLIP* IS INEFFECTIVE

A. Punitive Damages Jury Verdicts Are Getting Worse

Disproportionate punitive damages verdicts under current procedures in Alabama have reached intolerable levels. In the two years since *Haslip* was handed down, punitive damages in this state have exceeded $350 million dollars. Since January 1, 1987, the total is over $650 million dollars. A ten-year survey yields nearly $800 million dollars.

These are not estimates but are actual amounts derived from a list of punitive damages compiled by *amicus* and reproduced in the Appendix at 3a. The list does not disclose the amount of money that was actually paid by defendants in these lawsuits because, in addition to occasional remittiturs, some cases settle after trial for a sum less than the jury awarded. It also, however, does not account for "shadow verdicts" in the form of other cases which settle before trial. For every case that reaches a verdict, scores of others settle before trial, with settlement results dictated in large part by previous verdicts in similar cases. The latest Alabama figures indicate that pretrial settlements occur in 97 percent of all civil cases.[4] Thus the damages figures compiled in the Appendix are derived only from the 3 percent of cases that are tried to a verdict.

When viewed collectively, the actual jury verdicts and their "shadow" consequences require no exaggeration to suggest that the issue of punitive damages in Alabama is a *billion* dollar matter. Concern over this issue is heightened by the fact that the increase in punitive damages has coincided with a decrease in total civil case filings. After a decade of substantial growth, circuit court

[4] *From the Editors*, 8 ALA. DEF. LAW. A.J. at 5 (October, 1992).

filings in Alabama decreased slightly in 1992,[5] yet punitive damages continued to increase in size and frequency.

As in most states, punitive damages in Alabama are state compelled action permitted by common law as a tool to further society's interest in regulating wrongful conduct. They are the civil court equivalent of criminal fines, which Alabama allows to be paid to the plaintiff rather than the State. Chief Justice Rehnquist has described such windfalls as a "bounty" authorized by the state for bringing an offender to justice. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Punitive damages claims which once were infrequent are now demanded in virtually every tort case. The result is a civil justice system heavily weighted with quasi-criminal features, producing punitive awards that are grossly out of balance with the actual harm, but which reward the plaintiff handsomely.

A post-*Haslip* example of unbridled jury discretion in Alabama is *Ira Gore v. B.M.W.*, No. 90-CV-9658 (Jefferson Co. Cir. Ct., June 8, 1992), on appeal (Nos. 1920324 and 1920325), involving a plaintiff who purchased an automobile which had a defective paint job. The plaintiff complained he was defrauded, purchasing an automobile as new when in fact its original paint job was contaminated by acid rain. In addition to the $4,000 difference in value of the car, plaintiff was awarded a windfall $4 *million* dollars to "punish" the defendant. The verdict was upheld in its entirety by the trial court. Additionally, plaintiff's attorneys obtained through discovery the names of other BMW customers who purchased similar cars. More such lawsuits are now pending.

In *Sheridan v. Northwestern Mut. Life Ins. Co.*, No. 89-CV-2505-PR (Montgomery Co. Cir. Ct., April 10, 1992), on appeal (No. 1911110), a jury awarded $25 mil-

[5] Source: State of Alabama, Administrative Office of Courts (1993).

lion to a couple who purchased an insurance product from an agent who pocketed some of the premiums, thus rendering the company as much a victim as the customers. When Northwestern found the problem it voluntarily restored all economic loss to the plaintiffs ($9,000) and to other customers who were victimized. The agent subsequently disappeared, abandoning his car at a nearby international airport. A jury awarded separate punitive damage verdicts of $12.5 million against the renegade agent and the company. The trial judge, however, ordered Northwestern to ante the *full* $25 million without any remittitur. While the case was pending, plaintiff's attorney issued a newspaper invitation to meet other potential plaintiffs at a local hotel. More such lawsuits are now pending.

The best barometer of the explosive growth of punitive damages in Alabama is a historical comparison of the size of wrongful death verdicts, which, since 1859, have consisted of *purely* punitive damages. *See* ALA CODE § 6-5-410 (1975); *Alabama Great Southern R.R. v. Burgess*, 116 Ala. 509, 22 So. 913 (1897); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986). Thus the law in that field has remained a constant against which to fairly measure the upward growth in punitive damages.[6] A table demonstrating the historical trend of wrongful death verdicts is reproduced in the Appendix at A1. Prior to 1900 the largest such verdict, adjusted to 1988 dollars, was $150,000. *Richmond & D.R.R. v. Freeman*, 97 Ala. 298, 11 So. 800 (1892). Before 1970 the largest verdict, adjusted to 1988 dollars, was $307,000. *Airheart v. Green*, 267 Ala. 689, 104 So. 2d 687 (1958); *Liberty Nat'l Life Ins. Co. v. Weldon*, 267 Ala. 171, 100 So. 2d 696 (1958). In the past five years, several multi-*million* dollar wrongful death verdicts have been rendered and

[6] It bears noting that Alabama is unique in the nation in allowing plaintiffs to recover punitive damages in wrongful death actions upon proof of nothing more than "simple negligence." *Black Belt Wood, supra* ($2.5 million punishment for "simple negligence").

affirmed, the largest being $7.5 million *after* remittitur from $15 million. *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992). In the two years since *Haslip* was handed down, punitive damage verdicts in wrongful death cases have exceeded $59 *million* dollars.

B. Disparate Punitive Damages Are Still Being Affirmed

The above discussion is not offered to suggest that Alabama has declined to remit *any* punitive awards since *Haslip*. However, the Alabama court is typical of state courts which have failed to come to grips with the principles outlined in *Haslip*. Instead of examining what amount is "reasonably necessary" to achieve the punitive purposes, the Alabama court asks what is the *most* a jury could reasonably award, and it remits the verdict to that sum.[7] This is the *Haslip* test applied in reverse. The court conducts its "comparative analysis" without reference to smaller verdicts, the effect of which is to continually raise the ceiling.

The rationale for the Alabama court's comparative analysis in relation to the *highest* similar awards stems from its insistence that a jury verdict carries a strong "presumption of correctness." Indeed, this insistence exposes an incorrect premise upon which the *Haslip* opinion relied in affirming the Alabama model: that the appellate court has the power to independently review a punitive damages award.[8] No less than four days after *Haslip* was published, the Alabama court struck down legislation

[7] For example, in *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992), the court justified its remittitur of a $15 million dollar wrongful death award to $7.5 million by pointing to other large verdicts in wrongful death cases ranging from $4 to $12.5 million "in order to assure some degree of uniformity." *Id.* at 1064.

[8] *See Haslip*, 111 S. Ct. 1032, 1044.

which statutorily authorized courts to abandon the "presumption of correctness" standard in reviewing punitive damages verdicts. *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991). The effect of this standard is compounded by the fact that Alabama appellate courts impose a *double* measure of deference to punitive damages verdicts which have been upheld by the trial court, holding that the "presumption of correctness" is thereby "strengthened." *Id.* at 420.

In view of Alabama's extraordinarily deferential standard of review, it is not surprising that disparate punitive awards have repeatedly been upheld since *Haslip*. The Alabama court further insists upon rejecting *Haslip*'s mandate that punitive and compensatory damages should bear a rational relationship. In a case remanded from this Court for review of a $500,000 punitive damages verdict, the Alabama court said, "Imposing . . . a relationship [between compensatory and punitive damages] would inevitably result in *injustice*, and we decline to impose it."[9] *Southern Life Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1991) (compensatory damages of $1,000). This was no 'slip of the pen.' The same view has been reiterated in other cases which rejected the requirement of a relationship between punitive and compensatory damages as *contrary* to justice.[10] Furthermore, within the past two years, the Alabama court has made clear its view

[9] The Alabama court once subscribed to the belief that "the amount awarded as damages must bear some reasonable relation to the injury sustained and even though there might be a small amount of actual damages to be awarded, the amount allowed as punitive damages should not be disproportionate thereto." *Robertson v. McCarley*, 259 Ala. 583, 67 So. 2d 814, 817 (1953). That view has long since been abandoned.

[10] *See Associates Financial Services Corp. v. Barbour*, 592 So. 2d 191, 199 (Ala. 1991) (punitive purpose would be thwarted if any predictable relationship was required); *General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992) (holding that punitive damages need bear no relationship to actual damages).

that *no compensatory damages* need be awarded to support a substantial punitive damages verdict.[11]

In *Southen Life & Health v. Turner, supra*, the Alabama court on remand from this Court reconsidered and reaffirmed a punitive award 499 times greater than compensatory damages. Noting that the opinion ignored *Haslip*'s mandate for a relationship between compensatory and punitive damages, the court's senior member took the majority to task, stating, "the Court, on remand, clearly has not reconsidered the judgment and addressed an issue the Supreme Court of the United States considers relevant—the size of the punitive damages award when compared to the actual loss suffered." *Turner*, 586 So. 2d at 860 (Maddox, J., concurring in the result). On dissent from the court's denial of defendant's *Application for Stay*, he openly commented that the court's post-verdict review procedure was not working:

> It is frequently said that persons should rely more on what a person *does* than upon what he *says*. What this Court has *done*, especially since *Haslip* was released, shows that the procedure found in *Haslip* to be meaningful and adequate may not be.
>
> * * * * *
>
> I think that the Supreme Court of the United States may have been led to believe that a type of "independent review" was occurring, when in fact it was not, and is not.

Southern Life & Health Ins. Co. v. Turner, No. 88-1289, slip op. 2, 4 (Ala. Sept. 11, 1991) (Maddox, J., dissenting).

Instead of embracing the mandate for a rational relationship, the Alabama court has adopted a self-congratulatory interpretation of *Haslip* as blanket approval of its post-verdict review process. The repeated affirmance of ever-larger punitive awards, however, belies the fact that the model is little more than 'window dress-

[11] *See Shoals Ford v. McKinney*, 605 So. 2d 1197 (Ala. 1992); *Caterpillar v. Hightower*, 605 So. 2d 1193 (Ala. 1992); *First Bank of Boaz v. Fielder*, 590 So. 2d 893 (Ala. 1991).

ing' for a practice that actually treats jury verdicts as sacrosanct.[12]

In *Principal Financial Group v. Thomas*, 585 So. 2d 816 (Ala. 1991), the Court upheld a $750,000 judgment for failure to pay a $1,000 disability insurance contract claim—a 750 to 1 ratio, even though defendant's contractual liability was not finally resolved until the jury decided the issue in favor of the plaintiff. The trial court first set aside the award on post-verdict review. On appeal, the Alabama Supreme Court reinstated the full award based upon the "presumption of correctness" and the court's articulation for the first time of a new legal rule to support the $1,000 compensatory award.[13]

In *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 887 (Ala. 1992), the Alabama court, on remand in light of *Haslip*, reinstated a $1 million punitive award where compensatory damages were $12,400. In a concurring opinion, Alabama's senior justice again stated that "Post-*Haslip* reviews by this Court, including this one, indicate that the procedures, when actually applied are not adequate and meaningful." *Lindblom*, 598 So. 2d at 892 n.4.

In *Fraser v. Reynolds*, 588 So. 2d 488 (Ala. 1992), the Alabama court conducted no real *Haslip* analysis at all. *See Fraser*, 588 So. 2d at 453 (Maddox, J., dissenting). The case was tried twice, with the first jury awarding punitive damages of $30,000 and the second jury awarding $375,000. Despite a dissent which noted that such disparity between the awards suggested the higher award may not be fully necessary to accomplish society's goals, the Alabama court summarily affirmed without any post-verdict analysis of the amount. *Fraser*, 588 So. 2d at 455. *See also, Union Mortgage Co. v. Barlow*, 595 So. 2d 1335 (Ala. 1992) (Actual damages $6,000; punitive damages $6 million with no appellate analysis of excessiveness).

Alabama trial and appellate decisions over the past year reveal a state judiciary which has repeatedly failed to apply *Haslip*'s directives in a meaningful way. In sum, the Alabama scheme for post-verdict review as envisioned and approved by the Court in *Haslip* is not effective, even in the state whence it originated.

C. Legislative Solutions May Be an Impossibility

Amicus agrees it would be preferable if this problem were capable of being resolved on the state level by legislation, as Justice Scalia and other members of this Court have suggested.[14] Unfortunately it is not—at least not in Alabama. Justice Scalia's separate opinion in *Haslip* was premised on the assumption that Alabama and other "[s]tate legislatures . . . have the power to restrict or abolish the common-law practice of punitive damages." *Haslip*, 111 S.Ct. at 1054. He specifically referenced limitations in Florida and Virginia. While those statutes

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[12] *See*, for example, *Continental Eagle Corp. v. Mokrzycki*, —— So. 2d ——, 1992 WL 341848 at *5, wherein the Alabama court regarded itself as "*bound*" by a $100,000 punitive verdict due to the "presumption of correctness."

[13] Although it was undisputed that defendant's denial of the disability claim had nothing to do with the death of plaintiff's daughter from cancer, the Alabama court found justification for the $750,000 punitive award in part because plaintiff's daughter died of her disabling illness. Observing that "parents should not have to bury their children," the court's opinion suggests that the company's refusal to pay the claim at a time of profound grief for the mother served as partial justification for such punishment.

[14] *Haslip*, 111 S.Ct. at 1054 (Scalia, J., concurring specially). Justice O'Connor observed, ". . . state legislatures could establish fixed monetary limits for awards of punitive damages for particular kinds of conduct." *Haslip*, 111 S.Ct. at 1064 (O'Connor, J., dissenting). And in *Browning-Ferris*, Justice Brennan commented that Due Process is even "less indulgent" of awards made "without the benefit of a legislature's deliberation" than those that fall within statutory limits. *Browning-Ferris Ind. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1990) (Brennan, J., concurring). The question "whether due process acts as a check on undue jury discretion . . . in the absence of any express statutory limit" *assumes* the validity of legislative power to act in the realm of punitive damages. As noted in the text, that assumption may be incorrect. *See Haslip*, 111 S.Ct. at 1044 n.9.

have been judicially upheld, the Alabama Supreme Court has demonstrated a propensity to strike down every statute it has considered which would establish reasonable limitations on punitive damages. Other state courts likewise have declared certain statutory restrictions on the amount of damages invalid.

It does not take six, seven, and eight figure awards to punish defendants in most civil cases—which is what the 1987 Alabama Legislature indicated by unanimously passing several major revisions to the common law of punitive damages.

'As noted above, one of those changes removed the protected status of jury verdicts by abolishing the "presumption of correctness," thereby allowing the court to take an independent role in reviewing punitive damages awards. *See* ALA. CODE §§ 6-11-23, 6-11-24 (Cum. Supp. 1991). Despite being vested with broader power, the Alabama court invalidated the statute on "separation of powers" grounds (though neither party on appeal had raised a constitutional challenge to the statute). *See Armstrong v. Rogers's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991).

The Alabama court also has stricken a statute limiting noneconomic damages (including punitives) to $400,000 in medical malpractice cases, on grounds that it violated the right to jury trial. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1992); ALA. CODE § 6-5-544 (Cum. Supp. 1991). Likewise, it struck down a statute which allowed for periodic payment of "future damages" on right to jury trial grounds. *Clark v. Container Corp. of America*, 589 So. 2d 184 (Ala. 1991); ALA. CODE § 6-11-3 (Cum. Supp. 1991). The court presently is considering whether to strike down a statute which limits punitive damages to $250,000 (subject to certain statutory exceptions). *Alabama Power Co. v. Henderson*, No. 88-CV-992 (Tuscaloosa Co. Cir. Ct., August 1991), On Appeal (No. 1901875); ALA. CODE § 6-11-21 (Cum. Supp. 1991). The

main focus of the challenge is, again, the right to jury trial.

Such decisions would lead one to believe that Alabama's right to jury trial is the broadest in the nation, when in truth it is phrased in terms much narrower than the Seventh Amendment. *Compare* U.S. CONST. amend. VII *with* ALA. CONST. § 11. The Alabama court, however, takes a strong populist view of individual rights in relation to legislative power in the realm of common law tort limitations. Thus, for states like Alabama, a legislative solution to the problem of excessive punitive damages may be an impossibility.

II. THE COURT MUST ARTICULATE AN ASCERTAINABLE STANDARD

A. The Root Problem Is Still the Lack of Jury Standards

Regardless of what post-verdict review standards are imposed, until the root problem is solved, the situation will not improve. There is no rational justification for a post-verdict review process which attaches extraordinary deference to punitive damages verdicts unless they are the product of sufficiently guided and informed juries. Twenty years ago, when punitive damages were infrequent and insubstantial, basic jury instructions on punitive damages may have been acceptable. In the present environment they are not. If society were presented with a trend of increasing highway injuries, instead of disparate punitive damages awards, it would not address the problem by building more hospitals. Road improvements, speed limits, and improved training would be the first order of business. Likewise, the problem of irrational punitive damages should be addressed on the 'front end' before imposing additional post-verdict review measures.

Informing a jury that the imposition of damages is entirely discretionary, and asking them to simply take

into account the "character and degree of the wrong," provides no meaningful guidance.[15] It invites juries to return verdicts based upon how they "feel" in response to a defendant's misconduct. *Haslip*, 111 S.Ct. at 1057. (O'Connor, J., dissenting). When harm has resulted that cannot be rectified with money, there is an added element of frustration which leads to irrational results. Large defendants, perceived to have substantial resources, are inevitably targets for vengeance and frustrated fury.

Such jury charges fit very nicely into skilled plaintiffs' counsel's "send a message" closing argument—a formula that inevitably leads to substantial punitive damages having no relationship to the actual harm. Counsel first exhorts the jury to determine an amount sufficient to punish and deter *this* defendant, which, if the defendant is big, must be substantial. Counsel then exhorts the jury to determine an amount adequate to deter others like this defendant from committing similar wrongs. Again, this sum must be so substantial as to "reach the corporate offices" of other businesses through the news media. Then add the two. Such a formula affords the jury no rational guidance and produces verdicts that bear no understandable relationship to compensatory damages. As Justice Brennan noted, "guidance like this is scarcely better than no guidance at all." *Browning-Ferris*, 492 U.S. 257, 280 (Brennan, J., concurring).

Unfortunately such verdicts, prominently reported in the media and sanctioned by the courts, inevitably multiply. In states like Alabama and West Virginia they have gotten out of hand. Any modern criminal procedure which licensed juries to use their discretion to 'send a message' by their sentence would be rejected as barbaric.[16] That, however, is the *status quo* in civil cass in Alabama where juries are told, in the heat of the moment, that the

[15] *See Alabama Pattern Jury Instructions* 11.03 (1974).

[16] *See Stringer v. Mississippi*, 112 S.Ct. 1130 (1992) (Recognizing the due process requirement of adequate jury instructions during the sentencing phase of a criminal prosecution.)

amount of punishment is entirely discretionary. Such instructions are perfectly tailored to a 'more is better' argument. Policy decisions of such magnitude should occur in a more rational setting, not on an arbitrary basis. In the absence of statutory limits, they must at least be the result of instructions which better define the parameters within which a jury may act so as to reduce the risk of arbitrary results. The necessity for such instructions is doubly important in states like Alabama, where jury verdicts are accorded extraordinary deference.

As the Alabama court acknowledged before *Haslip*, there presently is no "yardstick" for the jury to use in measuring the amount of punitive damages that should be awarded.[17] *Green Oil v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989); *Rideout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127 (Ala. 1981) (Jones, J., concurring). Such a yardstick should be calibrated to tell the jury, for example, how the alleged misconduct compares to other types of fault in the range of misconduct. Neither are juries told that punitive damages must bear a rational relationship to the actual harm, as measured by compensatory damages. As Justice O'Connor noted in *Haslip*, juries in Alabama are not even instructed on the "Green Oil" factors by which their verdict will later be evaluated.[18] They are blind to the indicia of fairness, guided only by their instinctive reaction toward the defendant.

Due process imposes a rule of law upon the human impulse towards vengeance. It requires at a minimum an

[17] Justice O'Connor in *Haslip* noted that the Alabama Supreme Court itself acknowledged that its jury instruction procedures give "unguided discretion" and in no way dictate a rational jury verdict. (citing *Green Oil*, 539 So. 2d at 222; *Rideout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127-28 (Ala. 1981)). "Thus [it] . . . recognizes that its common law procedures produce irrational results, yet insists on deferring to these results." *Haslip*, 111 S.Ct. at 1063 (O'Connor, J., dissenting).

[18] The *Green Oil* factors in the Alabama model are set forth *supra* in footnote 2.

objective damages 'range,' a maximum ratio of punitive to actual damages, or both. As Alabama's experience teaches, no progress will be made toward that end until and unless this Court takes the lead in mandating more meaningful jury instructions.

B. Appellate Courts Need More Ascertainable Guidelines

In approving the Alabama Model for post-verdict review in *Haslip*, this Court concluded that a punitive award reflecting a multiple of four times the compensatory damages was "close to the line" of Due Process prohibition. Unfortunately, state courts have been unable to discern the contours of that line. Again, we will confine our discussion to Alabama.

As stated above, less than six months after *Haslip* was announced, the Alabama court rejected any notion that punitive and compensatory damages must bear a rational relationship, on grounds that such a requirement "would inevitably result in injustice." *Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1986). That view has since been reiterated. *See Associates Financial Services Corp. v. Barbour*, 592 So. 2d at 199; *General Motors Corp. v. Johnston*, 592 So. 2d at 1063. *But see, Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886, 891 (Ala. 1992) (citing a "rational relationship" between $12,400 compensatory and $1 million punitive damages).

Eschewing such a relationship, the court relies exclusively upon its *Green Oil* test in evaluating jury verdicts under a "presumption of correctness." A review of Alabama cases wherein the model was utilized, however, reveals it is largely form without substance. Massive punitive damages are repeatedly affirmed, without regard to their relationship to the compensatory award. At its core, the Alabama model is an articulation of the considerations behind the traditional standard of whether a verdict "shocks the judicial conscience." *See Green Oil,*

539 So. 2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?* 51 ALA. LAW. 90 (March, 1990).

As Justice Scalia has noted, a "shock the conscience" standard is really no standard at all.[19] It results in "jury-like verdicts" by appellate courts based upon their own subjective notions rather than objective standards. *Haslip*, 111 S.Ct. at 1046 (Scalia, J., concurring). By endorsing the Alabama model, *Haslip* merely transferred subjective discretion to the reviewing courts. Requiring a reasonable relationship between actual and punitive damages requires further articulation, because *any* ratio of punitive damages can and has been found to be reasonable.

Measured against appellate decisions only 10 years ago, it now takes a much larger jolt to shock the conscience of judges in jurisdictions like Alabama. Members of the trial bench and bar have become desensitized, like persons who frequent horror movies. Alabama decisions over the past 20 years reflect an increase in punitive damages awards that vastly exceeds the rate of economic growth. The aggregate of such awards is truly astounding, as shown in the Appendix tables.

The mere incantation of a subjective post-verdict standard is no substitute for meaningful enforcement of a defendant's right to fair punishment. Alabama, however, is not alone in failing to apply the principles outlined in *Haslip* in a meaningful way. The courts need more ascertainable guidelines for determining which punitive damages awards satisfy Due Process as compared to those which should be treated as suspect or facially excessive.

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[19] *See Browning-Ferris Ind., Inc. v. Kelco Disposal, Inc.*, Official Transcript of Proceedings Before The Supreme Court of the United States, at 24-27.

C. Amicus Curiae's Proposal for More Definite Standards

If any uniformity is to be achieved, this Court must articulate a more discernable standard for determining what measure of punitive damages "cross[es] the line." In most cases, a 3-to-1 ratio suggests itself as a reasonable standard, as evidenced by accepted statutory schemes which utilize that formula throughout the nation. A multiple of four is "close to the line" but not unconstitutional, as suggested by *Haslip*. Any multiple greater than five should be judicially regarded as suspect (if not facially excessive) where it exceeds the 'profit removal' and 'cost of litigation' criteria in the Alabama model.[20]

Moreover, this Court should recognize that a blanket "presumption of correctness" effectively eliminates an important layer of Due Process protection—especially in cases where juries are not given sufficiently meaningful instructions. A judicial policy of maximum deference, mixed with a lack of jury standards, is a recipe for disaster. Thus, in jurisdictions where verdicts are buttressed by extraordinary deference, as in Alabama, Due Process requires that juries be furnished instructions which establish more meaningful parameters and guidelines so as to avoid arbitrary and irrational punishments.

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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[20] *See* footnote 2, *supra*.

APPENDICES

APPENDIX A

HISTORICAL COMPARISON OF WRONGFUL DEATH AWARDS UPHELD BY THE ALABAMA SUPREME COURT

Year	Case Name	Original Verdict Amount	1988 Equivalent Dollars
1892	*Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 11 So. 800	8,000.00	$149,941.60
1900	*Lousville & N.R.R. v. Tegner*, 125 Ala. 593, 28 So. 510	7,500.00	145,866.75
1917	*Mobile Elec. Co. v. Fritz*, 200 Ala. 692, 77 So. 235	17,500.00	148,537.50
1918	*Louisville 7 N.R.R. v. Phillips*, 202 Ala. 502, 80 So. 790	15,000.00	127,116.00
1921	*Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 548	17,500.00	106,354.50
1936	*Southern Ry. v. Sherrill*, 232 Ala. 184, 167 So. 731	10,000.00*	84,942.00
1947	*Mobile v. Reeves*, 249 Ala. 488, 31 So. 2d 688	20,000.00	118,732.00
1954	*Alabama Power Co. v. Irwin*, 260 Ala. 673, 72 So. 2d 300	15,000.00	65,061.00
1958	*Airheart v. Green*, 267 Ala. 689, 104 So. 2d 687	75,000.00*	307,882.50
1958	*Liberty Nat'l Life Ins. Co. v. Weldon*, 267 Ala. 171, 100 So. 2d 696	75,000.00	307,882.50
1973	*Boise Cascade Corp. v. Lee*, 291 Ala. 666, 286 So. 2d 836	175,000.00	479,465.00
1973	*General Tel. Co. v. Cornish*, 291 Ala. 293, 280 So. 2d 541	75,000.00	205,485.00
1973	*Magnusson v. Swan*, 291 Ala. 151, 279 So. 2d 422	50,000.00	136,999.00

* Cases and figures through 1988 from Nettles and Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 ALA. L. REV. 475, 526 Table I (1989).

Year	Case Name	Original Verdict Amount	1988 Equivalent Dollars
1976	*Dees v. Gilley,* 339 So. 2d 1000	50,000.00	106,455.00
1982	*Estes Health Care Centers, Inc. v. Bannerman,* 411 So. 2d 109	500,000.00	625,400.00
1982	*Lane v. Otts,* 412 So. 2d 254	500,000.00	625,400.00
1984	*Deaton, Inc. v. Burroughs,* 456 So. 2d 771	835,000.00	954,572.00
1985	*General Motors Corp. v. Edwards,* 482 So. 2d 1176	1,600,000.00*	1,752,000.00
1986	*Alabama Power Co. v. Cantrell,* 507 So. 2d 1295	1,000,000.00	1,056,800.00
1986	*Black Belt Wood Co. v. Sessions,* 514 So. 2d 1249	3,500,000.00	3,698,800.00
1988	*Alabama Power Co. v. Capps,* 519 So. 2d 1328	500,000.00	500,000.00
1988	*Industrial Chem. & Fiberglass Co. v. Chandler,* 547 So. 2d 812	2,500,000.00*	2,500,000.00
1989	*Olympia Spa v. Johnson,* 547 So. 2d 80	3,000,000.00	
1989	*Turner v. Alabama Power Co.,* 575 So. 2d 551	3,500,000.00	
1990	*Lee v. The Children's Hospital of Alabama, Dr. Colby Atkins, et al.,* 603 So. 2d 937	6,875,000.00	
1992	*General Motors Corp. v. Johnston,* 592 So. 2d 1054	7,500,000.00	

APPENDIX B

Large Punitive Damages Verdicts and decisions in Alabama 1982-1992*

1992

(Non-Wrongful Death)

Mobile Asbestos Cases — 32,200,000
13 Asbestos cases consolidated for trial. Judgment against two asbestos manufacturers whose products were used at Mobile Shipyards (Keene Corp. and Owens-Illinois). 10 living and 3 deceased had asbestosis or lung cancer or both. Punitive damages ranging from $1,500,000 to $3,000,000 and compensatory damages ranging from $50,000 to $900,000. New trial ordered (785 F.Supp. 1448 (S.D. Ala. 1992)).

Patricia A. Cole v. Southern Valley Trust, et al. — 25,000,000
$1 million compensatory and $25 million punitive damages in insurance fraud case. Agent sold product as medical insurance policy which was actually unfunded trust. Plaintiff had radical mastectomy and company failed to pay for breast reconstruction and dropped her coverage. No. 90-CV-2573 (U.S. District Court N.D. Ala., March 2, 1992).

Enstar Group v. Richard Grassgreen — 20,000,000
Fraud suit. No. 90-CV-2234-G (Montgomery Co. Cir. Ct., April 9, 1992).

Maggie Lou Harrington v. Independent Life and Accident Ins. Co. — 6,230,000
Plaintiff alleged that insurer committed fraud by continuing to collect premiums on policy for ten years after the date that plaintiff became eligible for medicare where policy terminated on that date. No. 91-CV-113 (Marion Co. Cir. Ct., December 12, 1992).

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* The above list is the product of research by several members of the Alabama Trial bar, there being no official record or database containing such information. It appeared in earlier forms as Appendices to the briefs of petitioner and *Amicus* Alabama Defense Lawyers Association in *Pacific Mutual Life Ins. Co. v. Haslip, supra,* and *amicus* Alabama Defense Lawyers Association in *Healthamerica Inc. v. Mention,* Case No. 89-939, *cert. denied,* 493 U.S. 1093 (1989).

John Richards v. Michelin Tire Corporation — 5,000,000
Jury awarded $5 million in punitive damages and $161,475 in compensatory damages. This was a products liability case wherein plaintiffs claimed defendant failed to warn not to mount and inflate a 16 in. tire on a 16½ inch wheel. (786 F.Supp. 959 (S.D. Ala. 1992)).

Blakely Corp. et al. v. Murphy Oil Co. USA, Inc., — 4,600,000
Total verdict of $8 million, including 4.6 million punitive award for breach of contract and trespass arising out of environmental pollution of land. No. CA-89-0767-B (U.S. District Court S.D. Ala.) Notice of appeal docketed January 11, 1993.

Ira Gore v. BMW of North America and German Auto, Inc. — 4,000,000
$4,000 award of compensatory damages against all defendants and a $4 million award of punitives against BMW based on fraud. Defendants sold as new a car on which paint damage had been repaired. No. 90-CV-9658 (Jefferson Co. Cir. Ct., June 8, 1992) On Appeal Nos. 1920324 and 1920325.

Callaway v. Life & Health Ins. Co. — 3,000,000
Total verdict of $6 million for alleged fraud by group health insurer. No. 89-CV-0052 (Crenshaw Co. Cir. Ct., March 13, 1992).

Fred Cope v. United Ins. Co. of America — 3,000,000
Total verdict of $4 million. No. 90-CV-73 (Bullock Co. Cir. Ct., November 13, 1992).

Lindblom v. Intercontinental Life Ins. Co. — 3,000,000
Bad faith & fraud involving $10,000 death benefit. Affirmed conditional upon remittitur to $1 million. (598 So.2d 886 (Ala. 1992)).

B.W. Carter v. Bituminous Casualty Corp. — 2,500,000
Commercial insurance disputes over proper loading of a log truck and policy exclusions. No. 90-CV-222 (Marion Co. Cir. Ct., December 12, 1992).

Milton and Joanne Core v. H. & R Block — 2,000,000
$2 million in punitive damages and $254.50 in compensatory damages over fraudulent mishandling of tax refund. Post trial motions pending. No. 91-CV-43 (Chambers Co. Cir. Ct., September, 1992).

Todd v. United Steelworkers of America — 2,000,000
Fraudulent misrepresentation arising from insurer's representation that under HO's policy, the insurer would either rebuild or replace house or pay insureds $38,000. (Etowah Co. Cir. Ct., March 20, 1992).

Stewart v. ATEC Assoc., Russell Grimes, et al. — 2,000,000
$8.25 million verdict; $2 million past damages; $2.25 million future damages and $2 million punitive damages. Co-employee suit where plaintiff claimed he developed leukemia from Benzine vapors. No. 91-CV-1846 (Madison Co. Cir. Ct., October 23, 1992).

Foster v. Life Ins. Co. of Georgia — 1,250,000
Insurance company sold Foster, a 71 year-old woman who could not read and write, a Medicare supplement policy, premiums paid for three years. Foster made a claim which was denied because she did not have underlying Medicare coverage. (Mobile Co. Cir. Ct., November 4, 1992).

Lawrence Lowery v. Dr. Humphrey Osmond, et al. — 1,000,000
$1 million in punitive damages against three Bryce Hospital employees over allegedly improper release of violent patient who attacked and severely injured his sister four months after release. No. 85-647 (Tuscaloosa Co. Cir. Ct., February 28, 1992) Appeal pending.

Bernice White v. First Capitol Mortg. Co., et al. — 500,000
Plaintiff alleged fraud and bad faith involving credit life insurance. (Tallapoosa Co. Cir. Ct., August 28, 1992.)

Booth, Inc. v. Britamco Underwriting, Inc. — 500,000
Verdict against law firm for conflict of interest in insurance defense setting. No. 91-CV-346 (Tuscaloosa Co. Cir. Ct., November 12, 1992).

Delchamps v. Lela Morgan — 500,000
Mobile County case involving claim for malicious prosecution arising from alleged theft of pack of cigarettes. Punitive award reversed, remanded for new trial. (601 So.2d 442 (Ala. 1992)).

Ex parte Martin — 300,000
Mandamus petition related to fraudulent representation regarding sale of medical insurance. Plaintiffs settled with several defendants (for $225,000). Jury returned $300,000 verdict against remaining defendants. (598 So.2d 1381 (Ala. 1992)).

Smith v. States General Life Ins. Co. 250,000
Plaintiff sued insurer for fraud in sale of policy of medical insurance. $600 compensatory; $250,000 punitive. (592 So.2d 1021 (Ala. 1992)).

(Wrongful Death)

Little v. Fontaine Trucking Company 25,000,000
Wrongful death involving alleged failure to install backup alarms (Greene Co. Cir. Ct., November 6, 1992) Motion for new trial pending, January 4, 1993.

General Motors Corp. v. Johnson 15,000,000
Plaintiff alleged that pickup truck was defective under Alabama Extended Manufacturer's Liability Doctrine. ($75,000 compensatory $15,000,000, punitive remitted to $7,500,000) (592 So. 2d 1054 (Ala. 1992)).

Charles Lee and Glendon T. Lee, individually and as natural parents and natural guardian of Charles R. Lee, deceased v. The Children's Hospital of Alabama, Dr. Colby Atkins, et al. 6,875,000
Medical malpractice suit alleging wrongful death of four-year-old child. Affirmed (603 So.2d 937 (Ala. 1992)).

Annie Harris, et al. v. Sears Roebuck Company, et al. 4,000,000
$4 million for wrongful death of tennage girl where relative took out electric hot water heater and replaced with old, used gas water heater which he did not vent. Gas heater was several years old and did not have instructions for proper venting. One co-defendant pro tantoed out for $1 million and component part manufacturer pro tantoed out for undisclosed amount. No. 90-CV-35 (Lowndes Co. Cir. Ct., February 27, 1992) Appeal pending.

Penny Daily v. Mazda 1,600,000
Wrongful death action out of minor's death after a door latch on a Mazda automobile failed. No. 90-CV-574 (Colbert Co. Cir. Ct., April, 1992).

Marinelli & Madonia v. Volkswagen 1,566,666
Jurors awarded the parents of two teenagers $783,333 apiece in a lawsuit stemming from the fatal 1989 wreck of a volkswagen vehicle, "The Thing". The families claimed Volkswagen was negligent because it had never tested the vehicle for "rollover stability" before selling the Thing in the U.S. No. 89-CV-3301 (Jefferson Co. Cir. Ct.).

Estate of Robert Dorough v. City of Hoover 1,500,000
$1.5 million for wrongful death of intoxicated driver traveling the wrong way on I-459 who was fatally shot by police officer attempting to stop him. Additional $5,500 awarded for violation of constitutional rights. Deceased man had been drinking at local tavern nearly all day, at one time was sleeping on bar, and his blood alcohol content was three times the legal limit for intoxication. No. 91-CV-557 (U.S. District Court N.D. Ala., January 17, 1992).

1991

(Non-Wrongful Death)

Steiner Marine v. RCA and General Electric 50,000,000
$50,000,000 in punitive damages and $1.3 million in compensatory damages for breach of contract and fraud invloving shipbuilding contract. No. 88-CV-0558-RV (U.S. District Court S.D. Ala., March 4, 1991).

Robert and Mattie Person, et al. v. Union Mortgage Co. & Charles Harper. 45,000,000
Five plaintiffs awarded $45,000,000 alleging that they had been defrauded on loans approved for repairs on their homes. Jury also returned $45,000,000 verdict against Harper, the contractor. (Lowndes Co. Cir. Ct., July 24, 1991).

Sheridan v. Northwestern Mutual Ins. Co. 25,000,000
Punitive award against insurer and agent for fraud, where agent had stolen approximately $9,000 in premiums and disappeared. Separate verdicts of $12.4 million in punitive damages against each defendant, which trial court combined. No. 89-CV-2505-PR (Montgomery Co. Cir. Ct., December, 1991). On appeal. No. 191110.

Boykin v. Trinity Ins. Co. 6,250,000
Punitive damages verdict for bad faith on uninsured motorist claims; settled post-trial. No. 90-CV-02 (Barbour Co. Cir. Ct.) Appealed November 7, 1991, settled before appeal date.

Willie Mae Barlow et al. v. Union Mortgage Co. 6,000,000
Lowdes Co. Cir. Ct. $150,000 compensatory damages and $6,000,000 punitive damages alleging fraud involving $2,000 home repair loan. Allegation of "hidden" finance charge. Verdict upheld by trial judge; Affirmed (595 So.2d 1335 (Ala. 1991)).

Toole v. Baxter Healthcare Corp. **$5,000,000 punitive damages against manufacturer of silicone breast implants remitted to $2 million. Trial court found that "pattern or practice" exception applied and declined to apply $250,000 punitive cap. (778 F.Supp. 1543 (M.D. Ala. 1991)).**	5,000,000
Southern Life & Health Ins. Co. v. Turner **Punitive damages for bad faith and fraud involving $1,000 death benefits. Remitted from $5 million to $500,000. Vacated and remanded to Alabama Supreme Court by U.S. Supreme Court. Settled after remand. (586 So.2d 854 (Ala. 1991)).**	5,000,000
James L. Hilley v. Allstate Insurance **Fraud count involving failure of insurance company to pay fire loss on home insured for less than $50,000. Affirmed (595 So.2d 873 (Ala. 1990)).**	2,000,000
Cahaba Land Associates, Inc., et al. v. Secor Bank **$3,300,000 award, including $1,270,000 in punitive damages, to company and four partners for bank's actions in real estate deal. No. 88-CV-4065 (Jefferson Co. Cir. Ct., October 1991).**	1,270,000
Roberts v. Federation of American Consumers and Travelers, et al. **Claim alleging fraudulent representation by an insurance company. $500,000 in compensatory damages and $1,000,000 in punitive damages. No. 89-CV-634 (Calhoun Co. Cir. Ct., September 13, 1991).**	1,000,000
Roy Crowell & Myrtle Crowell v. Reserve Nat. Ins. Co. & Phillip Bailey. **$25,000 compensatory damages and $1,000,000 punitive damages for alleged fraud involving supplemental health insurance policy issued to elderly couple. Insurance company determined that claims amounting to approximately $800 were related to pre-existing condition excluded from coverage. No. 90-CV-1863-PH (Montgomery Co. Cir. Ct., October 25, 1991) On appeal.**	1,000,000
H.L. Callahan v. Thomas W. Fulton, et al. **Jury verdict of $1,000,000 in punitive damages and $2,927,500.80 in compensatory damages for fraud in shareholder freeze out setting. No. 91-CV-1226-BLK (Mobile Co. Cir. Ct., November 12, 1991).**	1,000,000

Northington v. Alfa Ins. Co. **Total verdict of $850,000 against insurer for alleged bad faith failure to renew. (604 So.2d 758 (Ala. 1991)).**	750,000
Robert McDonald v. Continental Casualty Co. (CNA) **Tort of outrage for late payment of workmen's compensation benefits. Affirmed (567 So.2d 1208 (Ala. 1990)).**	750,000
Thomas v. Principal Mut. Ins. Co. **Bad faith failure to pay $1,000 death benefits. Punitive award was set aside by trial court on defendant's motion for J.N.O.V. Alabama Supreme Court reinstated and affirmed $750,000 punitive damage award (566 So.2d 735 (Ala. 1990)).**	750,000
Massachusetts Mutual Life Ins. Co. v. Collins **Fraud, conspiracy to defraud, outrage, and fraudulent representation arising from sale of an insurance policy. Affirmed (575 So.2d 1005 (Ala. 1990)).**	750,000
Lombus v. Mitchell Transport, Inc., et al. **Wrongful death. Remanded for *Hammond/Green Oil* review. (590 So.2d 192 (Ala. 1991)).**	600,000
Harris v. M & S Toyota, Inc. **Alleged fraud involving sale of car. Verdict affirmed (575 So.2d 74 (1991)).**	500,000
The Standard Plan v. Tucker **In special verdict accompanied by answers to interrogatories, jury found insurance agency guilty of negligence and awarded $1,083.19 in damages; also found against insurer on claim of breach of contract and bad faith failure to pay claim and awarded $500,000 in punitive damages. Affirmed (582 So.2d 1024 (Ala. 1991)).**	500,000
Brown v. United Companies Financial Corp. **$250,000 for emotional distress and $250,000 for fraud. (584 So.2d 470 (Ala. 1991)).**	500,000
Mease v. Southern Technical College **Compensatory damages of $10,000 and punitive damages of $450,000 against a trade school for misrepresenting the transferability of course credits. No. 90-CV-663 (Montgomery Co. Cir. Ct.).**	450,000

Fraser v. Reynolds 375,000
Fraud claim involving sale of apartment complex; actual damages of approximately $15,000. Affirmed (588 So.2d 448 (Ala. 1991)).

(Wrongful Death)

Bobby and Retha Allen v. Physicians' Weight Loss Centers of America, Inc. 15,000,000
Wrongful death case involving 23 year-old who died from an irregular heartbeat after losing 21 pounds in weight-loss program. No. 89-CV-1969 (Mobile Co. Cir. Ct., June 5, 1991).

Thomas Madden, father of Michelle Madden, deceased v. Magnolla Bay, Inc., d/b/a Family Planning Medical Center of Mobile and Dr. O.B. Evans. 10,000,000
Medical malpractice case involving death of 18-year-old college student after having a incomplete abortion. No. 87-CV-899 (Mobile Co. Cir. Ct., June 5, 1991) On appeal, May, 1992.

Turner v. Alabama Power Company 4,500,000
Wrongful death suit. $4.5 million verdict remitted to $3.5 million. (575 So.2d 551 (Ala. 1991)).

Mahid Jahandarfard, et al. v. Lomax Killough, et al. 2,500,000
Wrongful death. (Affirmed 578 So.2d 1041 (1991)).

Gina Garner, mother of Johnathon Garner, deceased v. City of Opp. 750,000
Wrongful death case involving 19-month old child killed in car accident which allegedly occurred because of an improperly maintained stop sign. No. 89-CV-103 (Covington Co. Cir. Ct., November 27, 1991). On appeal to Supreme Court.

William Thornton v. Yamaha Motor Co. Ltd., et al. 750,000
Wrongful death of a child whose Christmas present motorbike crashed. Affirmed (579 So.2d 619 (Ala. 1991).

1990

(Non-Wrongful Death)

Michael Braun & Ian Braun v. Soldier of Fortune 10,000,000
$10 million punitive damages and $400,000 compensatory damages, plus $2 million in compensatory to be shared by Michael Braun and Ian Braun. Judgment reduced by Judge Hobbs to $2.375 million but did not affect compensatory damages. (757 F.Supp. 1325 (M.D. Ala. 1990)).

Overstreet v. Insurance Company of North America, et al. 10,000,000
Alleged insurance fraud, $10,000,000 punitive damages award against agency, individuals dismissed. No. 86-CV-002312 (Mobile Co. Cir. Ct., June 8, 1990).

Annie B. Smith v. MBL Life Assurance Corp and Mutual Benefit Life Insurance Co. 4,500,000
$4,500,000 punitive damages and $250,000 compensatory damages in breach of contract, fraud and bad faith case on question of existence of life insurance policy. Punitive award set aside on J.N.O.V., affirmed at 589 So.2d 691 (Ala. 1991). No. 84-CV-3028 (Jefferson Co. Cir. Ct., June 1990).

Elliott v. Brunswick Corp. 3,000,000
$1.5 million compensatory damages and $3 million punitive damages awarded for injury when rotating propeller of boat motor struck and injured plaintiff. Reversed on appeal from N.D. Ala. (903 F.2d 1505 (11th Cir. 1990)).

Clarke v. Traffanstedt v. Estate of Thomas Holmes and Human Hospital-Muscle Shoals 2,500,000
Medical Malpractice against hospital and estate of deceased physician. Verdict includes $985,000 compensatory damages and $2.5 million punitive damages against hospital only. Alabama Supreme Court reversed and remanded as inconsistent. (597 So.2d 667 (Ala. 1990)).

Marvin Roberts v. National Security Insurance 2,000,000
Claim involving breach of contract and fraud. Contract count dismissed prior to trial. Settled post-trial. No. 87-CV-4063 (Jefferson Co. Cir. Ct., October 8, 1990).

Shelby King v. Pioneer Life Insurance Co. 2,000,000
Breach of contract and bad faith suit. $2,000,000 verdict includes approximately $23,000 compensatory damages and $1,977,000 punitive damages for breach of contract. No. 87-CV-152 (Escambia Co. Cir. Ct., July 31, 1990).

E & S Facilities, Inc., et al. v. Precision Chipper Corp., et al. 1,750,000
Alleged fraud in the procurement of products liability insurance. Verdict for $875,000 each against insurance agency and insurance broker/wholesaler. Affirmed by Alabama Supreme Court. (565 So.2d 54 (Ala. 1990)).

Bachus v. The Club 90, Inc. 1,700,000
Auto Accident in which plaintiff was severely injured in a head on collision with an intoxicated driver (Dram Shop Act case). Plaintiff's medical expenses were just over $150,000. (Mobile Co. Cir. Ct., September 27, 1990).

Pacifico v. Jackson 1,650,000
Jury award in a personal injury medical malpractice case reinstated. (562 So.2d 174 (Ala. 1990)).

Kitchen Foods, Inc. v. Arby's, Inc. et al. 1,500,000
Punitive damages awarded in connection with misrepresentations in sale of franchise No. 88-CV-0761-P-M (U.S. District Court S.D. Ala., June, 1990).

Carter v. Old American Ins. Co. 1,400,000
$1,400,000 punitive damages for bad faith nonpayment of health insurance claim. *See* 544 So. 2d 917 (Ala. 1989) wherein summary judgment for the insurer was reversed. 87-CV-6 (Lauderdale Co. Cir. Ct., April, 1990).

Burden v. Empire Fire & Marine Ins. Co. 1,000,000
Alleged bad faith for failing to settle uninsured motorist claim. $400,000 awarded for compensatory damages and $1,000,000 for punitive damages. Post-trial motions pending. No. 88-CV-244 (Lauderdale Co. Cir. Ct., March 2, 1990).

Tom Beatry, Jr. v. Ford-New Holland Tractor Co. 1,000,000
Verdict awarding $25,000 in compensatory damages and $1,000,000 in punitive damages in malicious prosecution suit. Reversed & rendered (602 So.2d 1198 (1992)).

Fuller v. Preferred Risk Life Ins. Co. 1,000,000
Alleged breach of contract and insurance fraud, $16,764.82 compensatory damages on breach of contract; $1,000,000 punitive damages and $1.00 compensatory damages on fraud count. Punitive damages remitted to $250,000 on Motion for JNOV/New Trial. Alabama Supreme Court reversed and reinstated full $1 million verdict. (577 So.2d 878 (Ala. 1990)).

Pacific Mutual Life Ins. Co. v. Haslip 1,000,000
Fraud by insurance agent who pocketed the premiums and allowed plaintiff's health insurance to lapse. Affirmed by the Supreme Court of the United States. (111 S.Ct. 1032 (1991)).

Braden v. Dorsey Motor Sales, Inc. 1,000,000
$1,000,000 punitive damages, $15,600 compensatory damages for alleged fraudulent misrepresentation by car dealer that a used car was "new." No. 89-CV-004 (Autauga Co. Cir. Ct., April 3, 1990).

Ramsey Health Care, Inc. v. Follmer 800,000
Alleged fraud. Affirmed by Alabama Supreme Court. (560 So.2d 746 (Ala. 1990)).

Green Tree Acceptance, Inc. v. Standridge 750,000
Fraud, outrage involving repossession of mobile home. Judgment on outrage claim reversed and remanded, remainder affirmed, 565 So.2d 36 (Ala. 1990)).

American Employers Ins. Co. v. Southern Seeding Services, Inc. 750,000
Verdict awarding $400,000 in compensatory damages and $750,000 in punitive damages. No. 87-CV-G-0294S (U.S. District Court N.D. Ala., February 22, 1990).

(Wrongful Death)

Wilburn v. Luxaire, et al. 50,000,000
$50,000,000 punitive damages, plus previous settlement of $11,500,000 for wrongful death of five-member family resulting from alleged negligence involving heating unit. No. 88-CV-147 *et seq.* (Mobile Co. Cir. Ct., April, 1990) Settled on appeal.

Burlington-Northern R.R. v. Whitt 15,000,000
Wanton misconduct involving railroad crossing accident. Remitted to $5,000,000 by Alabama Supreme Court. (575 So.2d 1011 (Ala. 1990)).

Betty Greens Ingram v. Anniston Medical Clinic 3,500,000
Medical Malpractice claim resulting in wrongful death. No. 86-CV-611 (Calhoun Co. Cir. Ct., August 11, 1990).

Sue Chumney as Administrator of the Estate of Christopher E. Long, deceased v. Flowers Hospital 3,000,000
Wrongful death of child. Settled post-trial. No. 87-CV-57 (Houston Co. Cir. Ct., 1990).

Tate v. P.P.G. Industries — 2,500,000
Punitive damages for wantonness in wrongful death case. (U.S. District Court S.D. Ala., February 19, 1990).

Montgomery Health Care Facility v. Ballard — 2,000,000
Wrongful death Trial court denied motion for remittitur. Affirmed (565 So.2d 221 (Ala. 1990).

Estate of Conley v. Flay-O-Rich — 2,000,000
Wrongful death of milkman whose delivery truck overturned due to alleged failure to maintain steering. No 87-CV-0073 (Jefferson Co. Cir. Ct., November 5, 1990).

Kumar v. Lewis — 875,000
Medical malpractice involving death of a child. Affirmed (561 So.2d 1082 (Ala. 1990)).

1989
(Non-Wrongful Death)

Sigafoose v. Babson Brothers Co. — 10,000,000
$10 million punitive damages for fraud involving $21,000 compensatory claim. Settled post trial. Appeal dismissed. (596 So.2d 56 (1989)).

Braswell v. Conagra — 9,100,000
Breach of contract and fraud, $4,050,000 in compensatory damages and $9,100,000 in punitive damages. No. 86-CV-00741-T-S (U.S. District Court M.D. Ala., November, 1989).

State Farm Auto. Ins. Co. v. Robbins — 5,000,000
$5 million punitive damages for bad faith and fraud involving $700 disability claim. Remitted to $500,000. Affirmed (541 So.2d 477 (Ala. 1989)).

United Serv. Auto Ass'n v. Wade — 3,500,000
$3.5 million non-jury punitive damages verdict for bad faith remitted to $2.5 million. Compensatory damages of $166,795 plus $21,962 on contract count. Affirmed (544 So.2d 906 (Ala. 1989)).

Joiner v. Intercontinental Life Insurance Co. — 3,012,400
Fraud concerning insurance policy. Plaintiff received $80,000 compensatory and $3 million punitive; reduced by Judge Hobbs to $960,000 punitive and $40,000 compensatory. No. 89-CV-H-879-S (U.S. District Court M.D. Ala).

Ford v. Colonial Mortgage Co.
Punitive damages for fraudulent breach of residential home loan commitment. No. 89-CV-010 (Russel Co. Cir. Ct., November 1989).

Land & Associates, Inc. v. Simmons — 2,500,000
Fraud involving $10,000 in life insurance proceeds. Affirmed (562 So.2d 140 (1989)).

Blackburn, et al. v. Altus Bank — 2,038,753
Alleged fraud. Two plaintiffs, $1,538,753 for one plaintiff, $500,000 for other plaintiff. No. 88-CV-2263 (Mobile Co. Cir. Ct., November 30, 1989). Appeal pending.

White, et al. v. Georgia Casualty Ins. Co. — 2,000,000
Bad faith action. Reversed and remanded by Alabama Supreme Court (582 So.2d 487 (Ala. 1991)).

HealthAmerica, et al. v. Menton — 1,800,000
Fraud claim involving $2,400 claim for medical benefits. Affirmed (551 So.2d 235 (Ala. 1989)).

Phillips v. United American Ins. Co. — 1,800,000
Bad Faith and fraud involving $264 unpaid balance on medical claim. Settled post-trial. No. 87-CV-132JSS (June 2, 1989).

Barclay International v. First Ala Bank — 1,800,000
Baldwin County banking case concerning letter of credit issued to plaintiff but called upon in full by First Ala. Bank; First Ala. Bank was awarded $1.8 million in counterclaim. Reversed and remanded (557 So.2d 1201 (1989)).

Brenda Scroggins v. Averbuch Enterprises, Inc. — 1,700,000
Plaintiff paralyzed from gunshot; failure to provide protection in apartment complex. No. 89-CV-2152-P (Madison Co. Cir. Ct.).

Turner v. Deutz-Allis Credit Corporation — 1,609,500
Settled post-trial. No. 85-CV-043 (Barbour Co. Cir. Ct., October 9, 1989).

Terry v. John Carner and Leisure American, Inc. — 1,500,000
Fraud claim involving $5,500 actual damages. Settled prior to appeal. No. 85-CV-6777 (Jefferson Co. Cir. Ct., November 1, 1989).

State Farm Mutual Automobile Ins. Co. v. Hollis, Adm. Bad faith falure to settle lawsuit and wanton failure to file supersedeas bond. Reversed and remanded for new trial. (516 So.2d 576 (Ala. 1987)). Affirmed after verdict in second trial. (554 So.2d 387 (Ala. 1989)). — 1,500,000

Porter v. Hook — 1,300,000
Action for breach of written contracts. Breach of unwritten joint venture agreement and fraud against cable television owner. Remitted to $300,000 by trial court. Full verdict reinstated by Supreme Court of Alabama. (554 So.2d 382 (Ala. 1989)).

Carlis v. Ft. Deposit Motor Co., et al. — 1,000,000
Fraud involving sale of credit life insurance; approximately $1,000 compensatory damages, $1,000,000 remitted to $250,000. No. 87-CV-30 (Macon Co. Cir. Ct., April 19, 1989)).

United American Ins. Co. v. Brumley — 1,000,000
Marion County Bad faith involving compensatory damages of $5,000. Affirmed (542 So.2d 1231 (Ala. 1989)).

Alabama Power Co. v. Foster — 1,000,000
Shipyard worker injured when boat mast contacted overhead power lines. (555 So.2d 174 (Ala. 1989)).

Battles Entertainment, Inc. v. First Federal Savings and Loan Assoc. of Russell County, et al. Fraud in connection with a sale of real estate. Settled post-trial. No. 88-CV-083 (Lee Co. Cir. Ct., April 20, 1989). — 800,000

Vintage Enterprises v. Jaye — 500,000
Tallapoosa County $500,000 punitive damages and $20,000 compensatory, relating to sale, order, delivery of mobile home, fraud, wantonness, negligence, warranty and Magnuson-Moss theories. Affirmed (547 So.2d 1169 (Ala. 1989)).

Watson, Watson & Rutland v. Rosser Fabrap Int'l — 500,000
Intentional interference with business relationship, No. 88-CV-H-1292-N (U.S. District Court M.D. Ala.).

Hargrove v. Cantrell — 127,717
$127,717 punitive damages, $23,134 compensatory damages for odometer rollback. Affirmed (547 So.2d 488 (Ala. 1989)).

Green Oil Co. v. Hornsby — 150,000
$150,000 punitive damages, $14,704.06 compensatory damages, for fraud. Punitive damages remitted to $25,000. Affirmed (539 So.2d 218 (Ala. 1989)).

(Wrongful Death)

Thornton v. Knollwood Park Hospital — $5,000,000
Wrongful death; failure to diagnose baby's spinal meningitis. No. 85-CV-1275, (Mobile Co. Cir. Ct., 1989), settled on Appeal.

Olympia Spa v. Johnson — 3,000,000
Mobile County wrongful death involving steam room scalding. Affirmed (547 So.2d 80 (Ala. 1989)).

Clardy v. Sanders — 2,750,000
Wrongful Death. Affirmed (551 So.2d 1057 (Ala. 1989)).

Proctor & Gamble Co. v. Staples — 2,750,000
Wrongful death, Reversed on appeal. Settled thereafter. (551 So.2d 949 (Ala. 1989)).

Pettus, Estate of v. Vari-Care — 2,500,000
Wrongful death. No. 86-CV-196 (Mobile Co. Cir. Ct., June 20, 1989).

Stovall v. First American Health Care, Inc. — 2,000,000
Wrongful death involving alleged substandard medical care at a nursing home. No. 87-CV-173 (Montgomery Co. Cir. Ct., May 1989).

Beyer v. Beech Aircraft Corp. — 1,500,000
No. CV-81-2120 (Jefferson Co. Cir. Ct., 1989).

Shelby County v. Bailey — 1,000,000
Jefferson County Cir. Ct. Wrongful death $1,000,000. Affirmed (545 So.2d 743 (Ala. 1989)).

Central Alabama Electric Corp. v. Tapley — 1,000,000
Dump truck bed contacted power line. Affirmed (546 So.2d 371 (Ala. 1989)).

Shelby County v. Bailey — 1,000,000
Jefferson County Wrongful death—$500,000 each for two deaths. Affirmed (545 So.2d 743 (Ala. 1989)).

Mallory v. Hobbs Trailers 500,000
Jefferson County Wrongful death. Trial court granted defendant's motion for J.N.O.V. Verdict reinstated by Supreme Court of Alabama. (554 So.2d 966 (Ala. 1989)).

1988

(Non-Wrongful Death

Joshua Medders, a minor, et al. v. Darlene Forsythe Harris; Dr. Gerald Woodruff Medical malpractice. $6.5 million verdict against Harris only. No judgment against Dr. Woodruff. No. 88-CV-364 (Calhoun Co. Cir. Ct.) 6,500,000

Walls v. Colonial Mortgage Co. 1,700,000
Fraud involving breach of residential home loan commitment; compensatory damages of $2,500 or less. Settled pending appeal, (companion case to *Ford v. Colonial Mortgage*) (No. 87-CV-194 (Russell Co. Cir. Ct., 1988).

Trawick v. Michaels of Oregon Co. 1,000,000
Products liability involving rifle swivel. Total verdict $3.9 million, No. 88-CSV-C-413N (U.S. District Court M.D. Ala., December 21, 1998) (Settled pending appeal.

Carner, et al. v. Commercial Union Ins., Co., et al. 811,804
Breach of contract and bad faith. No. 82-CV-3504 (Jefferson Co. Cir. Ct., 1988).

Isbell v. Thompson-Hayward Chemical Co., et al. 675,000
No. 88-CV-162 (Jefferson Co. Cir. Ct.).
Adams v. The City of Bessemer, et al.
No. 88-CV-222 (Jefferson Co. Cir. Ct.).
Trammell v. Bessemer Water Service, et al.
87-CV-627 (Jefferson Co. Cir. Ct.).
Verdict $746,000 ($675,000 punitive damages) chemicals in water service.

Achord v. Mormar Incorporated 500,000
Products liability suit. Verdict of $863,625 includes $500,000 punitive damages. No. 87-CV-D-0824-N (United States District Court M.D. Ala., September 6, 1988).

Walmart Stores, Inc. v. Jones 200,000
False imprisonment. Affirmed (533 So.2d 551 (Ala. 1988)).

(Wrongful Death)

Helen Johnston as Administratix of the Estate of Bart Griffin and Ford Lewis v. General Motors Corp. 15,000,000 7,500,000
No. 88-CV-117 (Marengo Co. Cir. Ct.).

Industrial Chemical & Fiberglass v. Chandler 3,750,000
Jefferson County $3,750,000 punitive damages—$2.5 million for wrongful death and $1.25 million for breach of warranty. Affirmed (547 So.2d 812 (Ala. 1988)).

Heathcoat v. Mitchell Potts, et al. 3,000,000
Wrongful death. No. 85-CV-7805, 85-CV-7288 (U.S. District Court N.D. Ala. 1988).

Williams v. Rust International 1,000,000
Wrongful death, 82-CV-174 (Jefferson Co. Cir. Ct., 1988).

Treadwell Ford, Inc. v. Campbell 1,000,000
Mobile County wrongful death involving a defect in the accelerator of a pickup truck. Affirmed by Alabama Supreme Court (465 So.2d 312 (Ala. 1986)). Appeal dismissed by U.S. Supreme Court (486 U.S. 1028 (1988)).

Alabama Power Co. v. Cantrell 1,000,000
St. Clair County Wrongful death involving antenna contacting uninsulated power line. Affirmed by Alabama Supreme Court (507 So.2d 1295 (Ala. 1986)), Appeal dismissed by U.S. Supreme Court (486 U.S. 1028 (1988)).

Alabama Power Co. v. Courtney 750,000
Chilton County auto accident. Affirmed (539 So.2d 170 (Ala. 1988)).

Consolidated Freightways v. Pacheaco-Rivera 525,000
Wrongful death auto accident. (524 So.2d 346 (Ala. 1988)).

Alabama Farm Bureau v. Hixon 500,000
Montgomery County. Reversed on appeal (533 So.2d 518 (Ala. 1988)).

Alabama Power Co. v. Capps 500,000
Butler County Wrongful death involving dump truck contacting overhead power line (only simple negligence alleged/proved). Affirmed (519 So.2d 1328 (Ala. 1988)).

1987

(Non-Wrongful Death)

Ard v. South Baldwin Hospital — 5,500,000
Medical malpractice. Brain damaged child. No. 87-CV-303 (Baldwin Co. Cir. Ct.).

Estate of Jackson v. Phillips Petroleum Co. — 5,100,000 / 2,500,000
Reduced punitive damages from $5,041,694.04 to $300,000 in one case, and from $2,519,439.85 to $150,000 in another. Claim for conversion, intentional interference with contractual relations and wrongful exercise of lien rights. New trial granted on refusal to remit punitive damages. (676 F.Supp. 1142 (S.D. Ala. 1987)).

Super Valu Stores, Inc. v. Peterson — 5,000,000
Breach of contract and fraud in employment relationship. Affirmed (506 So.2d 317 (Ala. 1987)).

Aetna Life Ins. Co. v. Lavoie — 3,500,000
(Mobile County) $3 million punitive damages for bad faith refusal to pay $1,650 medical claim. Affirmed by Alabama Supreme Court, then vacated on appeal to U.S. Supreme Court and thereafter remitted to $500,000 by Alabama Supreme Court and affirmed. (505 So.2d 1050 (Ala. 1987)).

Ensor v. Wilson — 2,500,000
(Jefferson County) Medical malpractice involving childbirth, brain-damaged child. Affirmed by Alabama Supreme Court. (519 So.2d 1244 (Ala. 1987)).

Robbins v. National Security Insurance Company — 2,000,000
No. 87-CV-4063 (Jefferson Co. Cir. Ct.) Fraud.

State Farm Fire and Casualty Company v. Balmer — 1,500,000
86-CV-D-742-N (Verdict 8/05/87). $1,813,404 jury verdict includes $45,650 on breach of contract, $265,000 compensatory damages and $1,500,000 punitive damages on bad faith claim. Bad faith verdict set aside by U.S. District court on Motion for JNOV. (672 F.Supp. 1395 (M.D. Ala. 1987)).

Best Plant Food Products, Inc. v. Cagle — 972,000
(Jackson County) Breach of warranty/fraud/deceit in 1984. Affirmed (510 So.2d 229 (Ala. 1987)).

North Carolina Mut. Life Ins. Co. v. Holley — 500,000
Bad faith failure to pay $2,000 life insurance claim. Remitted to $500,000 by Alabama Supreme Court. (533 So.2d 497 (Ala. 1987)).

State Farm Fire & Cas. Ins. Co. v. Lynn — 250,000
$250,000 punitive damages, $25,000 compensatory, for fraud. Alabama Supreme Court ordered $4,078 remittitur of compensatory award and affirmed. (516 So.2d 1373 (Ala. 1987)).

Kabel v. Brady — 162,500
$162,500 punitive damages, $609 compensatory, where chiropractor fraudulently represented that Medicare would cover services performed. Affirmed (519 So.2d 912 (Ala. 1987)).

Dependable Ins. Co. v. Kirkpatrick — 150,000
$150,000 punitive damages for conversion of vacation cabin and its contents. Affirmed (514 So.2d 804 (Ala. 1987)).

John Hancock Variable Life Ins. Co. v. Pierce — 150,000
Fraud against insurance company. Affirmed (530 So.2d 719 (Ala. 1987), *cert. denied*, 486 U.S. 1032 (1988).

Hayes v. Payne — 140,000
Fraud verdict affirmed on return after remand (523 So.2d 333 (Ala. 1987)).

(Wrongful Death)

Dale, Estate of v. Griffin, Dept. of Mental Health — 11,701,372
Wrongful death; truck contacted low power lines. No. 85-CV-138-K (Montgomery Co. Cir. Ct., 1987).

Black Belt Wood Co. v. Sessions — 3,500,000
Jefferson County wrongful death death involving improperly loaded log truck. Affirmed (514 So.2d 1249 (Ala. 1987)).

Estate of John Meadows v. Ridgeview Healthcare Center — 2,000,000
No. 87-CV-501 (Walker County Cir. Ct.) Wrongful death. Reversed and remanded (590 So.2d 243).

Talmage v. Humana Hospital Florence, et al. — 1,500,000
Wrongful death. Settled post-trial. No. 85-CV-135 (Lauderdale Co. Cir. Ct., September 10, 1987).

Curry, Estate of v. Alabama Gas, et al. — 1,250,000
No. 86-CV-323-G (Montgomery Co. Cir. Ct., 1987).

Kathy Dunaway v. Alabama Power Company — 500,000
Montgomery County wrongful death. Appealed. JNOV for defendant reversed and remanded (502 So.2d 726 (Ala. 1987)).

Hixon v. Village West Trailer Park **Wrongful death involving drowning of child in trailer park swimming pool. Reversed and rendered on appeal (533 So.2d 518 (Ala. 1988)).**	**750,000**

1986

(Non-Wrongful Death)

Davison v. Mobile Infirmary **Mobile County $8 million punitive damages for medical malpractice remitted to $1,350,000. Remanded for second trial (456 So.2d 14 (Ala. 1984)). On appeal (518 So.2d 675 (Ala. 1986)).**	**8,000,000**
Bearden v. Anonymous Physicians and Hospital **$1,000,000 Medical malpractice involving childbirth; severe brain damage. CV-83-418 (Tuscaloosa Co. Cir. Ct., 1986).**	**1,000,000**
AmSouth Bank v. Speigner **Elmore County Wrongful completion, cashing of $25,000 check. Settled on appeal. (505 So.2d 1030 (Ala. 1986)).**	1,000,000
Rollison Logging Company of Alabama, Inc. v. John Ellis **Alleged fraud involving proposed purchase of logging equipment. Compensatory damages in the amount of $78,416 and punitive damages in the amount of $921,584. Remitted to $200,000. CV-84-03 (Cherokee Co. Cir. Ct., May 12, 1986).**	**921,584**
L.W. Johnson & Assoc. v. Rivers Constr. Co. **Marion County fraud action by county against developer involving $165,000 compensatory damages. Affirmed (532 So.2d 618 (Ala. 1988)).**	**500,000**
Mobile Dodge, Inc. v. Alford **$125,000 punitive damages (general verdict) for fraud by used car dealer. Affirmed (487 So.2d 866 (Ala. 1986)).**	**125,000**

(Wrongful Death)

Beck, Murray, Tull v. Piper Aircraft, et al. **Wrongful death. CV-83-6266 (Jefferson Co. Cir. Ct., 1986).**	**5,175,000**
Patricia L. Crandall, et al. v. Rudolph B. Williams **One death—$500,000, one personal injury—$2,500,000 (compensatory and punitive—general verdict); two personal injuries—$2,500 each (compensatory and punitive—general verdict), one subrogation—$30,000. Affirmed (514 So.2d 1249 (Ala. 1986)).**	**3,000,000**

Williams v. Price **Wrongful death involving drunk driver. (514 So.2d 1267 (Ala. 1986)).**	**500,000**

1985

(Non-Wrongful Death)

Holt v. State Farm Mutual **Fraud involving uninsured motorist stacking; $10,000 contract claim. Settled post-trial. CV-82-686 (Clay Co. Cir. Ct., 1985).**	**25,000,000**
McMillian v. Massey Ferguson, Inc. et al. **$10.5 million general verdict which included $584,000 actual damages for partial leg amputation caused by alleged wantonness in design & manufacture of grain auger. Settled pending appeal. CV-82-686 (Mobile Co. Cir. Ct., 1985).**	**10,500,000**
American Pioneer Life Ins. Co. v. Sandlin **Marion County $3 million punitive damages for fraud involving $100,000 compensatory damages. Affirmed (470 So.2d 657 (Ala. 1985)).**	**3,000,000**
Pasquale Food Co. v. Shakey's Inc. **Punitive damages for intentional interference with business relationship and improper acquisition of trade secrets. CV-82-2606 (Jefferson Co. Cir. Ct., 1985).**	**3,000,000**
Nationwide Mut. Ins. Co. v. Clay **Mobile County Bad faith involving $40,000 disability claim. Affirmed (469 So.2d 533 (Ala. 1985)).**	**1,250,000**
Griggs v. Northrop King and Alabama Feed Serv. **Verdict: $700,000; $100,000 actual damages; $600,000 punitive damages; asked for 1.4 million. Old seed sent to plaintiff instead of feed and plaintiff's cattle suffered problems. CV-85-4956 (Jefferson Co. Cir. Ct.).**	**600,000**
Alabama Power Co. v. Beam **Upheld $250,000 verdict for failure to provide safe place to work. (472 So.2d 619 (Ala. 1985)).**	**250,000**
Cooper Chevrolet, Inc. v. Chambers **$150,000 punitive damages for intentional fraud on sale of used car. Affirmed (529 So.2d 913 (Ala. 1985)).**	**150,000**

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(Wrongful Death)

Hicks v. Ireland — 25,000,000
Wrongful death resulting of from improper release of mentally ill patient who committed murder. Settled prior to appeal. CV-81-1621 (Montgomery Co. Cir. Co., 1985).

General Motors Corp. v. Edwards — 4,000,000
Jefferson County. Two plaintiffs at $2 million each. Remitted by trial court to $1.4 million each. Vehicle crashworthiness case. Affirmed (482 So.2d 1176 (Ala. 1985)).

May v. Lloyd Noland Foundation — 4,000,000
Wrongful death of baby. Settled post-trial. CV-79-583 (Jefferson Co. Cir. Ct., 1985).

Wright v. Superior Gas — 3,600,000
Wrongful death. Settled post-trial. CV-84-47 (Macon Co. Cir. Ct., 1985).

Hudson v. K&S Industries, Inc. — 2,000,000
Wrongful death. CV-84-593 (Montgomery Co. Cir. Ct., 1985).

1984

(Non-Wrongful Death)

Langston v. Osborne Truck Lines, Inc. — 2,581,000
$2,581,000 punitive plus compensatory damages award for injuries suffered in a traffic accident on September 15, 1981. ($1,525,000 to one plaintiff); $1,000,000 to one plaintiff); ($56,000 to one plaintiff). Three plaintiffs; two severely injured, one suffered minor injuries. Affirmed (454 So.2d 1317 (Ala. 1984)).

(Wrongful Death)

Deaton, Inc. v. Burroughs — 835,000
Wantonness alleged for improperly loaded truck resulting in wrongful death. Verdict of $835,000 affirmed (456 So.2d 771 (Ala. 1984)).

1983

(Non-Wrongful Death)

Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery, Fraud involving bank's breach of loan commitment. (Montgomery Co. Cir. Ct., February 9, 1983). — 4,000,000

Elting Center Corporation v. Owen's Corning Fiberglass Corp. Fraud, breach of express warranty action in connection with failure of roof on shopping center. (Lauderdale Co. Cir. Ct., April 3, 1983). — 1,557,000

National Sec. Fire & Gas Co. v. Bowen — 1,500,000
Landmark outrage and malicious prosecution case; affirmed verdict of $1,500,000 where special damages were about $50,000. (447 So.2d 133 (Ala. 1983)).

(Wrongful Death)

Williams v. Alabama Power Company — 3,500,000
Admiralty case involving wrongful death or both parents of a 9 year old girl. Parents killed when boat mast contacted overhead power line. (Mobile Co. Cir. Ct.).

1982

(Wrongful Death)

Drs. Lane, Bryant, et al. v. Otts — 5,000,000
Mobile County, wrongful death arising from complications with anesthesia (anesthetist failed to diagnose the developing complications). (Incident occurred on April 30, 1974). (412 So.2d 254 (Ala. 1982)).

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$500,000 verdict affirmed; retarded child died after complication developed from scalding bath given by nurse. (411 So.2d 109 (Ala. 1982)).

Supreme Court, U.S.
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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner

v.

ALLIANCE RESOURCES CORP.,
TUG FORK LAND COMPANY,
GEORGE KING, and GROVER C. GOODE,
Respondents

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question, which is encompassed in Question 2 in the petition for writ of certiorari:

Whether the standard for determining when an award of punitive damages is excessive, in violation of the Due Process Clause of the Fourteenth Amendment, should turn only upon the numerical relationship between the amount of the punishment and the amount of compensatory damages.

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INTEREST OF THE AMICI CURIAE

With the written consent of the parties pursuant to Rule 37 of the Rules of this Court, the amici curiae submit this brief in support of petitioner.

The amici curiae are firms engaged in the practice of the profession of accounting and auditing. They are the six largest firms practicing this profession in the United States and, collectively, report on the fi-

nancial statements of more than 90 percent of those companies whose securities are publicly traded in the United States.

Congress long ago concluded that independent public accountants perform an important public service. The Securities Act of 1933 and the Securities Exchange Act of 1934 require all public companies whose securities are registered with the Securities and Exchange Commission to have their financial statements examined by public accountants. *See* 15 U.S.C. § 77aa (Schedule A) (25)-(27) (registration statements required by the Securities Act for public offerings must contain financial statements that have been examined by a public accountant); *id.* § 78*l*(b)(1)(J)-(K) (same for registration under the Exchange Act of any security to be traded on an exchange).

Chronically targeted by plaintiffs as the "deep pocket" in various types of commercial tort litigation, amici have witnessed a sharp increase in the number of state and federal law claims filed against them. Based ostensibly on their rendition of professional services, amici have become "institutional defendants": the number of such claims filed against amici has quadrupled in the last decade. The size of the damage awards also has increased exponentially, culminating in a $338 million jury verdict against an accounting firm in 1992. Collectively, amici paid $404 million nationwide in litigation-related costs in 1990 and $477 million in 1991—nine percent of their United States auditing and accounting revenues.[1]

[1] There is nothing to suggest that this increase in actions and damages is related in any way to a decline in the quality of professional services rendered by independent auditors. *Cf.* Daniel R. Fischel, *The Regulation of Accounting: Some*

And amici are concerned that their increasing exposure to the risks of litigation will impede their recruitment and retention of the most qualified of professional personnel. *See* Alison Leigh Cowan, *The New Letdown: Making Partner*, N.Y. Times, Apr. 1, 1992, at D1 (benefits of partnership do not offset the greater exposure to lawsuits and firm's financial problems); Michael S. Raab, *Detecting and Preventing Financial Statement Fraud: The Roles of the Reporting Company and the Independent Auditor*, 5 Yale L. & Pol'y Rev. 514, 526 (1987) (footnote omitted) (accounting profession is "finding it increasingly difficult to attract quality personnel").

Even in those instances where the plaintiff's underlying claim is meritless, the lawsuits filed against amici often contain a demand for punitive damages. A classic in terrorem litigation tactic, such a demand operates to imbue a lawsuit with "a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Legal strategies are sometimes skewed as a result, with a consequent increase in litigation costs. Because of the substantial impact of even the threat of punitive damages on a profession whose activities Congress has found to be in the public interest, amici believe that

Economic Issues, 52 Brook. L. Rev. 1051, 1054 (1987) ("Unless there is some amazing coincidence whereby a high percentage of wrongdoers wind up in particular industries, . . . it is implausible that the problems of an entire industry are attributable to disclosure decisions by firms and their accountants."). Instead, amici suggest that they, like much of corporate America, have simply been caught up in the "tort explosion" of recent years. *See generally* Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (1988).

their views on the question of constitutional limits on the imposition of punitive damages may assist the Court in its consideration of this case.

SUMMARY OF ARGUMENT

The amount of punitive damages that may be exacted from a defendant in a particular case is a matter of local law in the first instance, but—as is the case with any governmental action that effects a deprivation of property—punitive damages awards also must comply with the requirements of the Due Process Clause. This Court indicated as much in its decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), examining not only the procedures by which the punishment was determined, but also the reasonableness of the amount of the award. And, *Pacific Mutual* itself is simply the latest in a long line of this Court's decisions establishing that a civil penalty violates due process if it is disproportionate to the objectives sought to be achieved by the imposition of such punishment.

There accordingly can be no doubt about the applicability of the substantive component of the Due Process Clause to the issue presented here. A punitive damages award that is not rationally related to the purposes of punitive damages is unconstitutionally excessive.

Much of the argument in the certiorari petition, and the discussion in the lower court's opinion, focuses on the ratio between the punitive award and the compensatory damages. While that ratio is one factor that may be considered in assessing the constitutionality of a punitive award—and a ratio such as that in this case almost certainly indicates the award's unconstitutionality—the converse assuredly

is not true. *A punitive award that is only a small multiple of the compensatory damages may also be irrational.* Multiplication of compensatory damages leads to excessive results when, as with amici, potentially very large compensatory awards—themselves wholly disproportionate to both the relatively small gains realized by the alleged wrongdoer and the nature of the alleged wrongdoing—already provide substantial punishment and deterrence. Thus, although a state court may choose to look to a multiple as a general guidepost, it cannot end its inquiry with that multiple. Instead, a court determining whether an award comports with due process must examine a variety of factors in order to decide whether the award is constitutionally permissible. A simple comparison of the amounts of punitive and compensatory damages will not suffice to establish the constitutionality of a punitive damages award.

ARGUMENT

THE DUE PROCESS STANDARD FOR ASSESSING THE REASONABLENESS OF AN AWARD OF PUNITIVE DAMAGES SHOULD NOT TURN SOLELY ON THE RATIO BETWEEN PUNITIVE AND COMPENSATORY DAMAGES

A. The Due Process Clause Of The Fourteenth Amendment Prohibits The Imposition Of Punitive Exactions That Are Arbitrary And Irrational

The Due Process Clause of the Fourteenth Amendment, "like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)) (citation omitted) (original source omitted). The Due

Process Clause requires that the government follow appropriate procedures in taking certain actions—procedural due process—and bars other actions entirely, "regardless of the fairness of the procedures used to implement them"—substantive due process. *Id.* Due process is not a technical concept and cannot be applied mechanically. Instead, due process "expresses the requirement of 'fundamental fairness,'" *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), and "prevents the government from engaging in conduct that 'shocks the conscience.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961)).

The Court has already held that punitive damages awards are subject to the strictures of the Due Process Clause. In *Pacific Mutual*, the Court analyzed Alabama's procedural safeguards for an award of punitive damages and determined that Alabama's scheme passed constitutional muster from a procedural perspective. 111 S. Ct. at 1043-1046.

The Court also considered the petitioner's substantive due process challenge to the size of the punitive damages award, finding that the award of more than four times compensatory damages "may be close . . . [but] does not cross the line into the area of constitutional impropriety." 111 S. Ct. at 1046 (footnote omitted). Although acknowledging that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," the Court observed that unlimited discretion "in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 1043. *See*

also Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989) ("There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme") (citing *St. Louis, I. Mt. & So. Ry. v. Williams*, 251 U.S. 63 (1919)); *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1300 (D.N.J. 1990) ("[W]e think that [*Browning-Ferris* and *Pacific Mutual*] can only be taken as evidence that an unreasonably generous award of punitive damages may be attacked under the Due Process Clause, which is hardly news.").[2]

Indeed, the Court has long held that the Due Process Clause prohibits excessive civil monetary penalties in litigation between private parties, just as it does

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[2] The conclusion that awards of punitive damages must comport with due process requirements is entirely unsurprising: punitive awards plainly constitute a government-compelled deprivation of property. A punitive damages award is embodied in the judgment of a state court—which itself constitutes state action—and state law obligates the defendant to pay the judgment. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (state action present when creditor, pursuant to state law, attached debtor's property in an ex parte proceeding); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (protections of the Due Process Clause extend to "civil . . . defendants [seeking] to protect their property"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (citation omitted) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law . . . . It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

in actions brought by the state. *St. Louis, I. Mt. & So. Ry.*, 251 U.S. at 66-67 (action by passenger against railroad) (Due Process Clause "places a limitation upon the power of the States to prescribe [civil] penalties" that are disproportionate and unreasonable).[3] And the Court has invalidated civil penalties on due process grounds. For example, in *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913), an action by a consignee against a railroad, the Court struck down a penalty of $500 for a $3.02 overcharge, holding that the penalty was "grossly out of proportion to the possible actual damages" and therefore in violation of due process. 230 U.S. at 351 (citing *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)); *see also Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-491 (1915) (invalidating penalty on due process grounds in an action against telephone company by customer). *Pacific Mutual* properly determined that these principles apply with the same force to awards of punitive damages.

Although substantive due process does not, as a term standing alone, lend itself to a single complete *and* precise definition, the Court has made clear that government action that bears no rational relationship to legitimate governmental purposes is arbitrary, irrational, and violates due process. *See Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498 & n.6

[3] Of course, the Court has also recognized that excessive fines remitted to the state violate due process. *See Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (Constitution would be violated by "fines . . . [that] are so grossly excessive as to amount to a deprivation of property without due process of law").

(1977); *see also Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 943-944 (D.C. Cir. 1988). Any government-compelled deprivation of property therefore must be rationally related to legitimate governmental objectives to pass muster under the Due Process Clause.

Pacific Mutual illustrates the difficulty in determining whether a specific award of punitive damages comports with the requirements of due process. The Court's expression of the problem, however, provides no basis for abstaining from giving content to this constitutional right or for adopting a wholly subjective and standardless inquiry. Instead, the proper approach is to assess the constitutionality of a punitive damages award by evaluating whether it is no more than what is reasonably necessary to accomplish the underlying governmental purposes. That is what the Court does in other contexts in which it must evaluate the proportionality and reasonableness of government action. *See Salerno*, 481 U.S. at 754 (emphasis added) ("when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, *and no more*"); *Enmund v. Florida*, 458 U.S. 782, 800-801 (1982) (criminal sentence justified by reference to purposes of criminal penalties—punishment and deterrence); *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947) (a court should calculate the appropriate fine for civil contempt by looking to the purposes for which the fine is imposed); *Chicago & N.W. Ry. v. Nye Schneider Fowler Co.*, 260 U.S. 35, 44 (1922) (civil penalties must be "reasonably sufficient to accomplish their legitimate object").

The deprivation of property through punitive damages has as its purposes punishment and deterrence. *Smith v. Wade*, 461 U.S. 30, 54 (1983) (quoting Restatement (Second) of Torts § 908(1) (1979)) (alteration in original) ("Punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' "); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (citation and internal quotation marks omitted) ("Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); Restatement (Second) of Torts § 908 cmt. a (1979).

So long as an award of punitive damages is "no more" than is "reasonably calculated" to serve the purposes of deterrence and punishment, it should pass muster under the Due Process Clause. However, to the extent an award of punitive damages exceeds the amount necessary to punish and deter, it is arbitrary, irrational, and violates substantive due process. *See Chicago & N.W. Ry.*, 260 U.S. at 44 (to be valid, "penalties . . . must be moderate and reasonably sufficient to accomplish their legitimate object"; those that are "plainly arbitrary and oppressive" violate the Due Process Clause); *St. Louis, I. Mt. & So. Ry.*, 251 U.S. at 67 (punishment is irrational and therefore violates the Due Process Clause if it is "wholly disproportioned to the offense and obviously unreasonable"); *Waters-Pierce*, 212 U.S. at 111 ("grossly excessive" civil penalties violate due process). Any other conclusion would allow juries greater sway than that accorded the legislatures that make, and

the courts that enforce, statutory civil penalties. *See Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring) ("I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.").

To protect against constitutionally impermissible arbitrariness and establish the required rational relationship to punishment and deterrence, courts adjudicating constitutional challenges to punitive awards can and should look to the various factors that have been identified by legislatures, courts, and commentators as reasonable considerations in fixing the proper amount of punitive damages. These include the character of the wrong, the motive for the defendant's conduct, including profitability to the defendant, the degree of calculation involved in the conduct, the necessity of preventing similar wrongs, the potential and actual harm caused by the defendant's conduct, the costs of litigation, the imposition of criminal penalties, the existence of other awards against the defendant arising out of the same alleged tort, and the relationship between compensatory and punitive damages. *See Pacific Mutual*, 111 S. Ct. at 1045; *Boise Dodge, Inc. v. Clark*, 453 P.2d 551 (Idaho 1969).[4]

[4] The States are, of course, free to establish different standards for use by juries in fixing the amount of punitive damages. The substantive restriction embodied in the Due Process Clause establishes an outside limit on the amount of punitive damages that may be awarded pursuant to that state law standard. *See Pacific Mutual*, 111 S. Ct. at 1043, 1046. Whether a particular award exceeds that outside limit is, of course, a question of constitutional law that must be determined by reference to a federal standard.

Importantly, *no single factor can by itself protect against arbitrariness or establish the required rational relationship in every case.* The fact situations that give rise to awards of punitive damages are simply too diverse for such an approach—different factors assume greater or lesser importance depending on the situation. The determination whether an award is constitutionally permissible must instead include consideration of all factors present in a given case that are relevant in determining whether the award is reasonably related to the purposes of punitive damages. In particular, as we next discuss, the due process standard cannot turn solely on the numerical relationship between compensatory and punitive damages. Such an approach would foster, not eliminate, arbitrariness in punitive damages awards.

B. Determining The Reasonableness Of A Punitive Award By Looking Only To The Numerical Ratio Between Compensaotry Damages And Punitive Damages Would Allow Arbitrary And Irrational Awards To Escape Condemnation Under The Due Process Clause

It sometimes has been suggested that punitive damages awards should be set at some multiple of compensatory awards. *See, e.g., Miley v. Oppenheimer & Co.*, 637 F.2d 318, 331 (5th Cir. Unit A Feb. 1981) (three times compensatory damages is "fairly good standard" for punitive damages in business torts). It may well be that a state court is free to determine that a multiple has some role to play in the assessment of punitive damages. For example, a multiple might be useful as an outside limit beyond which punitive damages would be deemed presumptively excessive and unconstitutional. However, a mechanical rule that tests the excessiveness of punitive damages *solely* by reference to their numerical relationship to

the compensatory award will produce arbitrary results in most cases. Indeed, it would be sheer fortuity if punitive damages awards that were determined only by reference to some multiple of compensatory damages resulted in rational awards. This is so because the amount of damages incurred by a plaintiff has no necessary connection to the gravity of the wrongful conduct of the defendant, the extent of the benefit obtained by the defendant as a result of the wrong, or the need for punishment and deterrence. *See In re Paris Air Crash*, 622 F.2d 1315, 1322 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980) (noting that focus of punitive damages is on the conduct of the defendant rather than the harm to the plaintiff). Thus, even where a punitive damages award fell within a presumptively constitutional range, other factors must be considered and might dictate the unconstitutionality of an award.

Many courts have recognized the inherent arbitrariness of applying a simple mathematical formula to determine punitive damages. As one court has observed:

> The amount of actual damages sustained by a plaintiff is one indication of the culpability of the defendant's acts, but it cannot be the sole criterion for the assessment of punitive damages . . . . [*T*]*he application of any fixed arithmetic ratio to all cases in which punitive damages are assessed would be arbitrary.*

Boise Dodge, 453 P.2d at 557 (emphasis added). *See also Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1991) (imposing an arbitrary mathematical relationship between compensatory and punitive damages "would inevitably result in injustice"); *cf. Krause v. Merickel*, 344 N.W.2d

398, 403 (Minn. 1984) ("No hard and fast mathematical ratio can be applicable in all cases without risking gross injustice.").

The simplistic mathematical calculation of damages has been condemned in other contexts as well. For example, quotient verdicts—damages determined by adding each juror's damages figure and dividing the total by the number of jurors—are universally disfavored. *See, e.g., Watson v. Navistar Int'l Transp. Corp.*, 827 P.2d 656 (Idaho 1992); *McNamee v. Woodbury Congregation of Jehovah's Witnesses*, 475 A.2d 262 (Conn. 1984); *Johnson v. Haupt*, 623 P.2d 537 (Kan. App. 1981); *Lazarte v. City of Mountain Brook*, 248 So. 2d 148 (Ala. Crim. App. 1970), *aff'd*, 248 So. 2d 153 (Ala. 1971). The primary reason quotient verdicts are so roundly condemned is that a verdict is supposed to be the result of reason and deliberation. *See Watson*, 827 P.2d at 666.

Here too, the application of a simplistic mathematical formula would preclude reason and deliberation. Instead, juries awarding punitive damages and courts reviewing those awards for constitutional error must balance *all* factors relevant to the punitive and deterrent purposes of punitive damages. *See Pacific Mutual*, 111 S. Ct. at 1045 (Alabama juries guided by more than a single factor).[5]

[5] Although for the reasons stated in the text, a multiple of compensatory damages cannot by itself provide the sole test of the excessiveness of a jury's award of punitive damages, the analysis in no way suggests that punitive damages derived from *statutory* multiplication of compensatory damages would necessarily be unconstitutionally excessive. *Cf.* 15 U.S.C. § 15 (treble damages for antitrust violations). This distinction derives from the fundamentally different institutional roles and capabilities of juries and legislatures,

Amici frequently are faced with cases in which the alleged damages climb well into the millions and sometimes hundreds of millions of dollars. And, as compensatory damages escalate, so too does the risk of gross injustice arising from the application of a multiplier to determine punitive damages. As recognized in *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991), a ratio that might seem reasonable when compensatory damages are below $100,000 results in excessive punitive damages when compensatory damages are above $100,000. *Id.* at 810. Likewise, a ratio that seems reasonable when compensatory damages are below $1 million becomes patently unreasonable when compensatory damages climb into the tens of millions of dollars. Thus, the

and the much greater deference therefore due to legislative determinations. *See Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring) ("I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits."). For example, a jury does not have the ability of a legislature to make detailed factual investigations to determine a rational way to fix punitive damages on the average for a particular class of cases. In contrast, legislative findings on such a question are squarely within the class of legislative determinations to which courts routinely defer. Second, unlike a legislature, a civil jury is an ad hoc body that exists only for the purpose of deciding a particular private dispute. Unlike a legislature, therefore, a jury is incapable of effectively considering the policies underlying the discrete task it is asked to perform, or the effects of its performance of that task beyond the case before it. Third, unlike a legislature, a jury does not embody the deliberate sense of the community as a whole concerning the overall purposes of punishment and deterrence, and is not directly responsible to the public at large for what it does.

use of nothing more than a predetermined ratio to evaluate punitive damages is inherently arbitrary and would not implement the requirement of rationality embodied in the Due Process Clause.

C. The Activities Of Large Accounting Firms Graphically Illustrate The Irrationality Of Determining Punitive Damages Based Solely On A Multiple Of Compensatory Damages

The situations in which amici are exposed to tort liability provide a graphic illustration of the constitutional infirmity in any rule that looks solely to a numerical ratio between compensatory damages and punitive damages.

Litigation against accounting firms most often arises out of an audit engagement. Simply stated, audits are conducted for the purpose of issuing an opinion whether, in the auditor's professional judgment, a corporation's financial position and results of operations have been fairly presented, in accordance with Generally Accepted Accounting Principles, in the financial statements issued by management. A major corporation engages in literally millions of financial transactions each year, and it obviously would be prohibitively expensive for the client to have the outside auditor review even a substantial portion of those transactions. *See Bily v. Arthur Young & Co.*, 834 P.2d 745, 749 (Cal. 1992), *modified on other grounds*, 3 Cal. 4th 1049a (Nov. 12, 1992).[6]

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[6] An audit is not intended to determine whether each individual account is correct. Rather, it is intended to provide a basis for expressing an opinion as to whether the financial statements *taken as a whole* are fairly presented in all material respects in accordance with Generally Accepted Accounting Principles. *See Codification of Auditing Standards*, Statement on Auditing Standards No. 1, § 150.02 (Am. Inst. of Certified Pub. Accountants 1991).

Regardless of the extent of the auditor's activities, the client and its management bear primary responsibility for the accuracy and adequacy of the client's financial statements. As the California Supreme Court observed in *Bily*:

> An auditor is a watchdog, not a bloodhound. As a matter of commercial reality, audits are performed in a client-controlled environment. The client typically prepares its own financial statements; it has direct control over and assumes primary responsibility for their contents. The client engages the auditor, pays for the audit, and communicates with audit personnel throughout the engagement. Because the auditor cannot in the time available become an expert in the client's business and record-keeping systems, the client necessarily furnishes the information base for the audit.

834 P.2d at 762 (citations omitted). *See also In re Interstate Hosiery Mills, Inc.*, 4 S.E.C. 706, 721 (1939) ("The fundamental and primary responsibility for the accuracy of information filed with the Commission and disseminated among the investors rests upon the management."); *Accounting Series Release* (ASR) No. 126 (1972), Fed. Sec. L. Rep. (CCH) ¶ 72,148; R. James Gormley, *The Law of Accountants and Auditors: Rights, Duties, and Liabilities* § 1.07[1], at 1-22 to 1-23 & nn.47-48 (1981); *Codification of Auditing Standards*, Statement on Auditing Standards No. 1, § 110.02 (Am. Inst. of Certified Pub. Accountants 1991).

In conducting their examination and rendering their opinion on management's financial statements

taken as a whole, auditors neither agree to detect every error, mistake, or dishonest act, nor guarantee that their decisions are correct. *See, e.g., SEC v. Arthur Young & Co.*, 590 F.2d 785, 788 (9th Cir. 1979) (quoting *SEC v. Republic Nat'l Life Ins. Co.*, 378 F. Supp. 430, 440 (S.D.N.Y. 1974)) (an auditor " 'is not a guarantor of the reports he prepares and is only duty bound to act honestly, in good faith and with reasonable care in the discharge of his professional obligations' "). "Moreover, an audit report is not a simple statement of verifiable fact that, like the weight of [a] load of beans can easily be checked against uniform standards of indisputable accuracy." *Bily*, 834 P.2d at 763 (citation omitted). Instead, an audit report is the subject of professional judgment. As the *Bily* court observed:

> [A]n audit report is a professional opinion based on numerous and complex factors . . . . [T]he report is based on the auditor's interpretation and application of hundreds of professional standards, many of which are broadly phrased and readily subject to different constructions. Although ultimately expressed in shorthand form, the report is the final product of a complex process involving discretion and judgment on the part of the auditor at every stage. Using different initial assumptions and approaches, different sampling techniques, and the wisdom of 20-20 hindsight, few CPA audits would be immune from criticism.

834 P.2d at 763.

Despite the limitations of the auditor's role, auditing firms often become the primary target of litigation because the client and its management often are essentially judgment-proof. Very large investments

and business transactions such as mergers and acquisitions often include consideration of the financial statements amici are called on by clients to examine. When these transactions go "sour," amici frequently "assume[] center stage as the remaining solvent defendant[s]." *Bily*, 834 P.2d at 763. Thus, amici find themselves subject to potentially very large compensatory awards even though any culpability on their part is almost always many orders of magnitude less than others involved in a particular transaction. The sheer size of the underlying investment or transaction undertaken by the client typically means that the amount of compensatory damages assessed against amici for economic loss may be in the millions of dollars and sometimes in the hundreds of millions.[7] In addition, compensatory awards are sometimes inflated by the natural tendency of juries

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[7] *See, e.g., Standard Chartered Plc. v. Price Waterhouse*, No. CV 88-34414 (Ariz. Super. Ct.) ($338 million in compensatory damages) (new trial ordered, Dec. 11, 1992); *United States Nat'l Bank of Galveston v. Coopers & Lybrand*, 89-CV-1081-A-212 (Tex. Feb. 4, 1992) ($20 million in compensatory damages, $200 million in punitive damages) (settled and vacated, Feb. 20, 1992); *SnyderGeneral Corp. v. KPMG Peat Marwick*, Civ. No. 90-14145-K (192d Judicial Dist., Dallas Cty. Tex. 1992) (settled 1992) ($10 million in compensatory damages and $2 million in punitive damages); *Hayes v. Haushalter*, MDL-00763 (D. Haw. Dec. 31, 1990), *appeal pending*, Nos. 91-15531, 91-15546, 91-15593 (9th Cir.) ($8.9 million in compensatory damages and $10 million in punitive damages awarded against Arthur Young & Company, predecessor to amicus Ernst & Young); *Westmont Tractor Co. v. Touche Ross & Co.*, No. 87-4242 (9th Cir. 1988) ($5 million in compensatory damages awarded against Touche Ross, predecessor to amicus Deloitte & Touche); *Manufacturers Hanover Trust Co. v. Arthur Andersen & Co.*, No. 82-CIV-6622 (S.D.N.Y. 1988) ($17 million in compensatory damages).

to overcompensate a plaintiff where an institutional defendant, viewed as having virtually unlimited resources, has been found responsible for even part of an innocent plaintiff's loss. *See, e.g.*, Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 225, 233 (Autumn 1989) (noting jury study demonstrating that jurors award plaintiffs more when the defendant is a corporation).

Such large compensatory damages are altogether disproportionate to the gravity of the alleged wrong of the accountant—a wrong that may be nothing more than professional misjudgment later found by a jury to have been "intentional," "reckless," or "grossly" negligent.[8] A multi-million-dollar compensatory award for such a misjudgment therefore already levies a very substantial punishment and deterrence on the accounting firm. *See Smith v. Wade*, 461 U.S. at 50 (exposure to compensatory liability deters potential tortfeasors).

Likewise, these very large compensatory damages are out of all proportion to the benefit an accounting firm might gain as a result of the wrong committed. Amici do not partake of the enormous economic gains shared by their clients and their clients' investment advisors; at most, the benefit that amici could expect to gain from any misconduct would be limited to the relatively modest income they receive from the particular professional services at issue. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990) (two years' audit fees do not approach potential losses to audit firm from perception of participation in fraud; allegation regarding payment of fees insufficient to allege scienter). Nevertheless, because they are often the only available "deep pocket," amici are faced with claims that greatly exceed the fees received for their professional services. *See, e.g.*, Edward Brodsky, *Liabilities of Accountants*, N.Y.L.J., Dec. 9, 1992, at 3 (noting jury verdict against accounting firm that was 2400 times the firm's annual audit fee of approximately $140,000). Thus, in the vast majority of cases confronting amici, the compensatory damages awards are already disproportionate to both culpability and gain. To multiply such an award by a fixed ratio simply exacerbates the disproportionality by building upon an already shaky foundation.

Accordingly, it is apparent that, in the context of litigation against auditors, the punitive and deterrent purposes of punitive damages already are served quite well by compensatory damages. *See Carey v. Piphus*, 435 U.S. 247, 256 (1978) (compensatory damages "formidable" deterrent); *Smith v. Wade*, 461 U.S. at 94 (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").[9] In these circum-

[8] The type of conduct required to obtain an award of punitive damages varies greatly among the states. Not all states require malicious or egregious conduct; several allow punitive damages simply upon a finding of "gross negligence." *See, e.g., Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038 (Kan.), *cert. denied*, 469 U.S. 965 (1984); *Art Hill Ford, Inc. v. Callender*, 423 N.E.2d 601 (Ind. 1981).

[9] The purposes of punishment and deterrence are further served by professional discipline. Auditors are subject to disciplinary action by both the American Institute of Certified Public Accountants and state boards of accountancy. Discipline can be severe; an accountant's license may be suspended or revoked for dishonesty, fraud, or gross negligence in the practice of accounting. *See, e.g.*, Pa. Stat. Ann. tit. 63,

stances, the rote application of a prescribed multiple of compensatory damages probably would never produce a constitutionally permissible measurement of punitive damages awards. For example, in *Manufacturers Hanover Trust Co. v. Arthur Andersen & Co.*, No. 82-CIV-6622 (S.D.N.Y. 1988), the jury awarded compensatory damages of $17 million. Following the standard suggested by the Fifth Circuit in *Miley*, 637 F.2d at 331—three times compensatory damages—a punitive damages award of $51 million would be deemed appropriate. Applying the test espoused by the court below—five times compensatory damages for "really stupid" conduct—the permissible punitive damages award would rise to $85 million. An even more graphic illustration of the absurd results of the rote application of a multiplier is provided by the compensatory damages award in *Standard Chartered Plc. v. Price Waterhouse*, No. CV 88-34414 (Ariz. Super. Ct.) (new trial ordered, December 11, 1992). In that case, the jury awarded compensatory damages of $338,000,000, despite the fact that the annual audit fee was approximately $140,000. Thus, the compensatory damages themselves were completely out of proportion to any "gain" obtained by Price Waterhouse. And applying a standard of three times compensatory damages would result in a punitive damages award of over $1 *billion*. Using a multiplier of five, the permissible punitive damages award would rise to nearly $1.7

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§ 9.9a; Tex. Rev. Civ. Stat. Ann. art. 41a-1, § 21; W. Va. Code § 30-9-12. In addition, the rules of the Securities and Exchange Commission provide that it may bar an accountant from practicing before it if it finds that the accountant has engaged in "unethical or improper professional conduct." *See* 17 C.F.R. § 201.2(e)(ii).

billion. It is self-evident that such awards cannot pass constitutional muster. Such arbitrary awards are the inevitable result of the simplistic application of a multiplier to determine punitive damages. Accordingly, the Court should reject any standard for awarding or evaluating punitive damages that looks solely to such a multiplier.

CONCLUSION

The judgment of the Supreme Court of West Virginia should be reversed.

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IN THE

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OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

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STATEMENT OF INTEREST

This brief is submitted on behalf of 20 *amici curiae* which include broadcasters, publishers, news services, and associations of working journalists and writers.[1] As members of the media, these *amici* operate under the constant threat of libel claims, almost all of which seek punitive damages. Both the frequency and amount of these awards have increased at an alarming rate in recent years.

The threat of punitive damage awards affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital role in the reporting and discussion of controversial public affairs. These *amici* therefore support the strict application of due process limitations urged by the petitioner in this case.

More importantly, although the case presently before the Court does not involve First Amendment issues, these *amici* urge the Court to recognize that special considerations may arise where the Bill of Rights is implicated; punitive damage awards in libel cases involving matters of public concern may be irreconcilable with the purposes of the First Amendment; and even the strictest due process limitations on punitive awards may not be adequate to protect First Amendment values in such cases.

SUMMARY OF ARGUMENT

The libel decisions of this Court have examined the problem of unrestrained punitive damage awards at length, and the Court has imposed constitutional limits on such awards arising from speech on matters of public concern. These limits are largely the result of heightened scrutiny mandated by the First Amendment, but they serve as a valuable touchstone for addressing due process limitations on punitive damages in general.

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[1] Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.

The Court recently imposed general due process constraints on punitive damage awards in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). As the case currently before this Court illustrates, however, the standards upheld in *Pacific Mutual* do not provide an effective check on the discretion of juries to impose enormous and unpredictable punitive damage awards. Nebulous requirements of proportionality to imprecise compensatory damages and vague assessments of past, present, and future conduct virtually assure juries the freedom to assess arbitrary awards against unpopular defendants, to which reviewing courts can do little more than defer.

At a minimum, such standards do not satisfy the heightened due process requirements of the First Amendment. Juries have used these standards to continue to award ever-increasing sums as punitive damages against media defendants, and courts' deferential review of such awards—when defendants can afford to appeal—cannot mitigate the resulting chill on constitutionally protected speech. The general due process standards employed by the West Virginia Supreme Court of Appeals provide no protection against unconstitutional excess in the award of such damages.

ARGUMENT

I. THE NEWS MEDIA REMAIN ESPECIALLY VULNERABLE TO THE ABUSES OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

The case before this Court represents only the second occasion on which the Court has been directly presented with the issue of due process constraints on the award of punitive damages. In libel cases, however, where First Amendment constraints are involved as well, the Court has long recognized the danger posed by punitive damages. In fact, the problem of unrestrained damage awards has been a constant theme in this Court's efforts to reconcile the common law of libel with competing First Amendment limitations.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as " 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' " *Id.* at 278 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).[2]

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and again in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the discussion of punitive damage awards occupied much of the Court's attention. Justice Harlan, originally supporting punitive damages in *Butts*, expressly retreated from that position in *Rosenbloom* and concluded:

> I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

403 U.S. at 77 (Harlan, J., dissenting). In a separate opinion, Justice Marshall, joined by Justice Stewart,

[2] The Court observed:

> Presumably a person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publication.

376 U.S. at 277-78; *see also Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("although punitive damages are 'quasi-criminal,' their imposition is unaccompanied by the types of safeguards present in criminal proceedings") (citation omitted); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 152-53 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 322-33 (1983) (suggesting application of Fourth, Fifth, and Sixth Amendments to punitive damages proceedings).

concluded that punitive damages should be prohibited altogether in such cases. *Id.* at 82-83 (Marshall, J., dissenting). These dissenting opinions became the foundation for the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court concluded:

> [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . . .

Id. at 350.[3]

Later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), four members of the Court joined in an opinion reasserting the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing juries' " 'largely uncontrolled discretion' to assess damages 'in wholly unpredictable amounts bearing no necessary relation to the actual harm caused' " as a rationale for the limitations imposed in *Gertz*. *Id.* at 779 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 350).

Each of these cases, including *Dun & Bradstreet*, affirmed the need for constitutional limits on the availability of libel damages to protect discussion of public affairs, with the Court in *Gertz* holding simply:

> [T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349.

Despite these stated concerns and limitations, both the amount and frequency of punitive damage awards against

[3] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting) ("Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*.").

the media in libel cases have continued to rise. During the 1980's, multi-million dollar verdicts against libel defendants became almost commonplace.[4] Many awards were overturned or reduced on appeal; many were questioned on constitutional grounds by courts and commentators alike;[5] but these facts are cold comfort to the publishers and broadcasters who may be forced to meet prohibitive bond requirements and to endure expensive appeals before constitutional safeguards are properly applied.

The trend toward ever-higher and increasingly irrational punitive awards has continued. The jury in *Feazell v. Belo Broadcasting Corp.*, No. 86-2227-1, National Law Journal, May 6, 1991, at 22 (Tex. Dist. Ct. April 19, 1991), awarded $41 million in punitive damages against

[4] One study reported that, between 1980 and 1984, approximately 60% of libel verdicts against media defendants included an award of punitive damages (compared to less than 10% for nonlibel cases involving money damages). The average punitive award was reported as substantially in excess of $2.5 million, and punitive damages accounted for approximately 80% of the total amount of damages awarded. Libel Defense Resource Center, *Recent Trends in Libel Damage Awards Against the Media*, Libel Defense Resource Center Bulletin No. 18 at 58-63 (Dec. 15, 1986). "In 1990-91 punitive damages were included by juries in more than three out of every four damage awards" and punitive damages during that period "averaged more than $8 million . . . with the median punitive award of $2.5 million, compared to just over $1.5 million and $200,000, respectively, for the [previous] decade." Libel Defense Resource Center Bulletin Special Issue B (July 31, 1992). *See also* Libel Defense Resource Center Bulletin No. 21 (Oct. 31, 1989); Libel Defense Resource Center Bulletin No. 11 (Nov. 14, 1984); Franklin, *Suing Media for Libel: A Litigation Study*, 1981 A.B.A. Res. J. 795, 829; Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20, 39-40 (Jan./Feb. 1987).

[5] *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 793-94 (1985) (Brennan, J., dissenting); Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

a local television station as part of the largest libel judgment in United States history. The challenged series of broadcasts was critical of the plaintiff's performance as District Attorney, discussing allegations that the plaintiff had improperly settled drunk driving cases.

In *Sprague v. Walter*, No. 3644, N.Y. Times, May 3, 1990, at 1, col. 2 (Pa. Ct. Com. Pl. May 3, 1990), a jury awarded $31.5 million in punitive damages against *The Philadelphia Inquirer* in the second largest libel judgment in U.S. history. This was the second time the case had been sent to a jury. On the first occasion, a different jury imposed a punitive award of "only" $3 million (a difference of $28.5 million) on the same set of facts. *See Sprague v. Walter*, 518 Pa. 425, 543 A.2d 1078, 1082 (affirming trial court order of retrial following first verdict), *appeal dismissed*, 488 U.S. 988 (1988).[6] The challenged articles concerned the plaintiff's role in an in-

[6] Nor is such disparity in results based on the same facts an isolated incident or limited to jury awards. In another recent (nonlibel) case, one judge noted:

> [T]he scoreboard on punitive damages on the *same* case, as to which the *same* principal facts relating to punitive damages were consistently established before finders of fact and reviewing courts, is:
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> | | |
> |---|---|
> | First Jury (1982) | $ 730,482.10 |
> | First Trial Court (1983) | $ 0.00 |
> | Second Jury (1987) | $11,000,000.00 |
> | Second Trial Court (1987) | $ 8,500,000.00 |
> | Court of Appeal (1992) | $ 2,788,906.00 |
>
> These results make superfluous any further comment on the whimsy, irrationality, and utter unpredictability infecting punitive damages awards in this state. This situation, unless reformed, will obviously continue to exist in California under our punitive damages scheme, which apparently remains constitutionally intact after [*Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991)].

Hilgedick v. Kochring Finance Corp., 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76, 94 (Peterson, J., concurring in the result) (emphasis in original), *review granted*, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992).

vestigation of a homicide while he was chief of homicide for the Philadelphia District Attorney's office.

In *Srivastava v. Harte Hanks Communications, Inc.*, No. 85 CI 15150, Communications Daily, May 7, 1990 (Tex. Ct. Com. Pl. May 15, 1990), a jury awarded the plaintiff $17.5 million in punitive damages in a libel action against a local television station. Plaintiff was a heart surgeon whose suit was based on a series of broadcasts reporting the revocation of his privileges at two San Antonio hospitals and detailing his alleged mishandling of several cases.

Despite the Court's admonition in *Gertz* and earlier libel cases, therefore, juries apparently are feeling no particular restraints, constitutional or otherwise, in awarding punitive damages in libel cases. Particularly troubling is the number of these mega-verdicts that are being imposed in cases arising out of commentary on public affairs and the fact that six- and seven-figure punitive awards seem to be imposed on news media defendants almost as a matter of course once the jury finds for the plaintiff on the question of liability.[7] Professor Van Alstyne, commenting on this disturbing pattern, observed that "juries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his general practice, or his business." Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 Wm. & Mary L. Rev. 793, 795-96 (1984).[8]

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[7] *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1142-43 (7th Cir. 1987) (upholding $2 million punitive damage award based on the amount of attorneys fees, defendant's wealth, and the conclusion that "[p]unitive damages are available under Illinois law when a plaintiff has proven actual malice"), *cert. denied*, 485 U.S. 993 (1988).

[8] Professor Van Alstyne also noted the possibility that attempts to restrict awards under the actual malice rule may have had the opposite impact on jurors:

> [A] juror might suppose that if recklessness must be proved and if recklessness also entitles the defendant to consideration of punitive damages, then absent some exceptional reasons, the juror ought assuredly and quite routinely award punitive damages . . . .

Van Alstyne, 25 Wm. & Mary L. Rev. at 797; *accord* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 613-15 (1989).

The influence of emotion and prejudice in such circumstances, moreover, is not confined to juries: "Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions." *Gertz*, 418 U.S. at 359 (Douglas, J., dissenting). Excessive damage awards thus also may reflect, in part, "localized judicial distaste for certain publishers" and judges' "understandable, but constitutionally improper, distaste for the defendant's publication." Van Alstyne, 25 Wm. & Mary L. Rev. at 801, 808.

In short, the danger of punitive damages in libel cases is not merely that they lack adequate constitutional restraints; it is that they are, by definition, a court-sanctioned invitation to *punish* the publisher or broadcaster. As long as punitive damages remain available as a weapon in such cases, there will be the temptation to punish for the wrong reasons, and restricting the amount of damages or the procedures under which they are awarded will not remove the temptation. Jurors and judges alike may simply find whatever they are told they need to find to justify the result, if the desire to punish the speaker or publisher is great enough.

II. THE FIRST AMENDMENT REQUIRES THE HIGHEST STANDARDS OF DUE PROCESS WHERE PUNISHMENT OR SUPPRESSION OF SPEECH IS THREATENED.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court concluded that punitive damage awards are constrained by due process. The Court did not address this issue in the context of First Amendment concerns and did not establish due process standards of

general applicability. Rather, the Court determined only that, in each case, "general concerns of reasonableness and adequate guidance from the court when the case is tried to the jury properly enter into the constitutional calculus." *Id.* at 1043. The Court then "conclude[d] that the punitive damages assessed by the jury against Pacific Mutual were not violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 1044.

Among the questions left unanswered by the Court's decision in *Pacific Mutual* is the sufficiency of due process standards in the context of libel cases. In one sense, punitive damages awarded in a libel action only differ from similar awards in other cases in that speech is the conduct being punished and deterred. The difference, of course, is significant. The Court has long recognized that any form of state regulation that restricts free speech demands heightened scrutiny of due process concerns, and the award of libel damages is such a "form of state regulation" subject to the rule. *See, e.g., New York Times*, 376 U.S. at 278; *see also R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (observing that state regulation of even proscribable speech is subject to constitutional restraints).

The general principle was summarized in *Speiser v. Randall*, 357 U.S. 513 (1958):

> When we deal with the complex of strands in the web of freedoms which make up free speech, *the operation and effect of the method* by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Id. at 520 (emphasis added). This principle is reflected in various rules that have been enunciated by the Court to ensure that any form of government restraint does not reach beyond the permitted bounds to impinge on protected speech. For example:

- The burden is on the State to establish that the restraint of speech is justified under the appropriate standard.[9]
- In cases of doubt, the balance must be struck in favor of protecting speech.[10]
- Encompassing both the prior rules, speech is presumed protected until proven otherwise with convincing clarity.[11]
- Those empowered to punish or restrain speech must do so only under narrowly drawn standards to avoid arbitrary and discriminatory content-based action.[12]
- Courts must independently review judgments that threaten protected speech.[13]

Such largely due process concerns, heightened by their First Amendment setting, led four members of the Court in *Dun & Bradstreet* to dissent from the award of punitive damages, even in the context of purely private speech. 472 U.S. at 775-76 (Brennan, J., dissenting). More recently, in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), Justice White, joined by Justice O'Connor and the Chief Justice, expressed concern about the constitutionality of punitive damages in a nonlibel (but First Amendment) context:

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[9] *E.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (and cases cited therein).

[10] *E.g., Hepps*, 475 U.S. at 776-78; *Gertz*, 418 U.S. at 341.

[11] *E.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (and cases cited therein).

[12] *E.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 552-53 (1975) (and cases cited therein).

[13] *E.g., Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984).

> The Court does not address the distinct constitutional questions raised by the award of punitive damages in this case. . . . That award is more troublesome than the compensatory award discussed above.

Id. at 553 n.5 (White, J., dissenting) (citation omitted).

Despite accepting the historic validation of punitive damages, Justice Scalia, in his concurrence in *Pacific Mutual*, also recognized that heightened scrutiny is required of punitive damage awards when First Amendment freedoms are at issue:

> [P]rocedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practice to the contrary. . . . [P]unitive damages, despite their historical sanction, can violate the First Amendment.

111 S. Ct. at 1054 (Scalia, J., concurring in the judgment) (emphasis in original).

Individual justices and the Court as a whole, therefore, have recognized that the First Amendment requires compliance with heightened due process standards. Neither the standards approved in *Pacific Mutual*, however, nor the standards employed by the West Virginia Supreme Court of Appeals in the current case before the Court, would satisfy these strict due process requirements.

III. THE AWARD OF PUNITIVE DAMAGES IN LIBEL CASES FAILS TO SATISFY HEIGHTENED DUE PROCESS STANDARDS REQUIRED BY THE FIRST AMENDMENT.

The danger punitive damages pose to protected speech was thoroughly explored in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The condemnation of such damages in that case would be enough, standing alone, to declare unconstitutional any punitive award in a libel case involving matters of public concern, were it not for the

Court's qualifying language, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. The Court thus left open the possibility that punitive damages may be awarded following a liability determination based on *New York Times* "actual malice."

The language in *Gertz* has been interpreted by some lower courts as a ruling that punitive damages flow automatically where *New York Times* "actual malice" is proven.[14] But the Court in *Gertz* did not discuss the relationship, if any, between such a finding and the award of punitive damages. The issue was left open and the holding simply confined to "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times.*" 418 U.S. at 350. In fact, the constitutional requirement of "actual malice" in libel cases neither includes nor even addresses common law malice or evil motive normally required to support a punitive damage award.[15]

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[14] *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) ("if Brown & Williamson does prove actual malice it can recover damages—actual, general, and punitive"). Other courts have been less hasty to assume this conclusion, but have continued to uphold punitive awards, in some cases because of the courts' uncertainty. *See, e.g., Maheu v. Hughes Tool Co.*, 569 F.2d 459, 479 (9th Cir. 1977) ("To us, the implication of the [*Gertz*] Court's use of the double negative is that punitive damages may be permitted when actual malice is proven.") (and cases cited therein).

[15] Courts as well as juries often use the term "actual malice" to connote much more than the limited defamation standard of liability applicable to public figures and issues:

> We recognize that the term "actual malice" has meant different things in the law, that its popular connotation may not always be the same as its legal meaning, and that its use has been criticized. Nevertheless, we simply use the term in this opinion as a shorthand method of referring to conduct characterized by evil motive, intent to injure, ill will, or fraud. *In instruct-*

For First Amendment purposes, punitive damages in libel cases must be viewed separately from the issue of liability, as a form of government action that seeks to punish and to deter speech.[16] Punitive damages thus must be subjected to the same careful scrutiny and heightened due process considerations that would be required of any statutory scheme that attempted to accomplish the same ends. *See New York Times*, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). Viewed in this perspective, punitive damages as currently awarded in libel cases, at least

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ing juries with respect to punitive damages, however, it would be preferable for trial judges not to use the term "actual malice."

Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633, 652 n.20 (1992) (citations omitted and emphasis added).

Even when the actual malice rule is properly applied, it does not necessarily reach the issue of whether the defendant's conduct is truly "outrageous" and prompted by the "evil motives" normally required to be shown before punitive damages may be awarded. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1977) (imposition of punitive damages is premised on outrageous conduct arising out of the defendant's evil motives). The requirement of actual malice in libel cases is a tool for defining the standard of liability, not the level of damages. "Actual malice" focuses only on the defendant's attitude toward the facts, and not on the defendant's attitude toward the plaintiff or any intent to do harm. *See, e.g., Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 854 (1985). It is possible, therefore, to have a technical finding of "actual malice" as defined by *New York Times* where there is absolutely no evidence of "malicious" conduct in the common sense of the word. The jury may then be invited to award punitive damages without any further restrictions.

[16] The legitimate state interest underlying the law of libel "extends no further than compensation for actual injury," *Gertz*, 418 U.S. at 349, and "punitive damages are wholly irrelevant to th[at] state interest." Id. at 350. The justification for punitive damages in libel cases thus must be assessed on its own merits; it does not flow automatically from the rationale for compensatory damages.

those cases involving matters of public concern, fail to comply with the heightened due process mandated by the First Amendment.

The Alabama jury instruction upheld in *Pacific Mutual* "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." 111 S. Ct. at 1044. The instruction also specifically provided that the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.*

In an action for libel, however, such instructions immediately conflict with First Amendment values. The declared purpose of "preventing similar wrong" in the context of defamation translates into a purpose to deter future speech. This is fundamentally at odds with the purposes of the First Amendment to encourage free and open debate and to prevent self-censorship. *See Gertz*, 418 U.S. at 350; *see also Near v. Minnesota*, 283 U.S. 697, 713-20 (1931) (discussing purposes of the First Amendment in the context of statutory restraint of speech).

In the case before this Court, the West Virginia Supreme Court of Appeals expanded on the Alabama instruction, requiring that the jury be instructed with many of the same factors Alabama courts may consider on appeal, *i.e.*, the "reprehensibility" of the defendant's conduct, including "whether how often the defendant engaged in similar conduct in the past"; that punitive damages should bear a "reasonable relationship" to compensatory damages awarded and to "the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred"; and that "the financial position of the defendant is relevant." *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 886-87 (W. Va. 1992). At best such instructions provide no due process

assurances in a libel case; at worst, they virtually guarantee that defendants' First and Fourteenth Amendment rights will be infringed.

These instructions permit the jury to assess punitive damages based, at least in part, on "similar conduct in the past" including conduct that did not result in compensable injury to the plaintiff, and may not have been actionable at all. *See id.* at 884 (permitting jury to consider evidence against TXO from case in which TXO prevailed). Such "conduct" in the libel context is constitutionally protected speech. Assessing punishment for current liability based on the prior exercise of a constitutional right is a classic violation of due process. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969); *see Near*, 283 U.S. at 713-20 (striking down state statute permitting injunction of newspaper operations as a nuisance based on past speech).

At a minimum, a media defendant could be compelled in every libel suit to relitigate numerous prior libel claims, whether or not such claims resulted in a lawsuit or a finding of liabilty. Media defendants thus would face virtually limitless liability based on prior, presumptively protected speech, as well as on previous findings of liability for which past plaintiffs already have been compensated. Imposing punitive liability for protected speech is anathema to the First Amendment, and assessing punitive damages based on a prior finding of unprotected speech—without limitation or substantive standards—does not meet minimal requirements of due process, much less the heightened standards required when First Amendment freedoms are implicated.

Nor is a viable limitation imposed on the jury's discretion when it is instructed that punitive damages should be "reasonably related" to "the harm that is *likely* to occur from the defendant's conduct as well as to the harm that actually has occurred." *Id.* at 886 (emphasis added). Such an instruction invites the jury to speculate on what

damage might have resulted under unspecified circumstances, unfettered by the constraints of foreseeability, proximate cause, or any other legal doctrine. Juries need little enough prompting to punish unpopular speech or defendants without instructing them to postulate on the possible harm that could have resulted "for want of a nail."

Requiring a "reasonable relationship" to compensatory damages also is an illusory restraint, particularly in libel cases in which compensatory damages are not subject to precise proof, and in some cases—despite the requirement in *Gertz* of actual injury, 418 U.S. at 349-50—"compensatory" damages are presumed and thus assessed without any proof.[17] The term "reasonable relationship," moreover, is not defined and has no inherent meaning. It accordingly fails to provide any effective limitation on a jury's discretion, as illustrated by the jury's apparent belief in *TXO* that $10 million in punitive damages bears a "reasonable relationship" to $19,000 in compensatory damages.

The West Virginia scheme for awarding punitive damages is more detailed than the Alabama instruction upheld in *Pacific Mutual*, but it nevertheless

> invites—even requires—arbitrary results. It gives free reign to the biases and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively. In short, it is the antithesis of due process.

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[17] *See Gertz*, 418 U.S. at 349 ("Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.").

Pacific Mutual, 111 S. Ct. at 1067 (O'Connor, J., dissenting).

Even if theoretical jury instructions could be devised to remedy these problems, however, the process of awarding punitive damages for libel remains one of punishment based on the content of speech. The award of punitive damages for libel also fails to provide the "breathing space" required in discussion of public affairs. Under even the most careful standards, it is virtually impossible to ensure that the future speech intended to be deterred will be limited to speech that is unprotected by the First Amendment. Such a loose standard in a statutory scheme would clearly be unconstitutional. *See Freedman v. Maryland*, 380 U.S. 51 (1965) (invalidating motion picture censorship statute on heightened due process grounds).

In short, the due process standards upheld in *Pacific Mutual* and as applied by the West Virginia Supreme Court of Appeals do not afford proper due process constraints on jury discretion, much less provide sufficient safeguards to protect First Amendment freedoms. Although standards and procedures that would ensure punishment of only unprotected speech may theoretically exist, both the concept and the practice of awarding punitive damages in the context of public debate appear to be fundamentally at odds with the purposes of the First Amendment.

IV. DEFERENTIAL APPELLATE REVIEW OF PUNITIVE DAMAGE AWARDS CANNOT SATISFY CONSTITUTIONAL REQUIREMENTS.

Despite the long-standing requirement of independent appellate review to protect against judgments that threaten First Amendment rights, *e.g.*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984), all too often appellate courts have refused to disturb judgments of punitive damages in libel cases unless "monstrously excessive" or so large

as to "shock the judicial conscience."[18] The Court in *Pacific Mutual* upheld Alabama's more detailed post-verdict review factors, but the scrutiny employed by subsequent courts for the most part has remained highly deferential, even in the First Amendment context.[19]

West Virginia adopted virtually the same factors for consideration on review upheld in *Pacific Mutual*. Along with cost and mitigation factors, the reviewing court must consider the reprehensibility of the defendant's con-

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[18] *See Gertz*, 418 U.S. at 350 ("In most jurisdictions, jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive."); *Brown & Williamson*, 827 F.2d at 1141 ($2 million punitive damage award upheld because the court concluded that jury was not "mere putty in the hands of the plaintiff").

[19] Courts generally have continued to use existing standards of review as being consistent with this Court's decision in *Pacific Mutual*. *See, e.g., Peoples Bank and Trust Co. v. Globe Int'l Publishing Co.*, 978 F.2d 1065, 1071 (8th Cir. 1992) (remanding for "substantial remittitur" of "shockingly inflated" $650,000 compensatory damage award, but affirming punitive damage award of $850,000, stating only that "[i]n formulating its instructions, the district court adequately considered the criteria set forth in [*Pacific Mutual*], as well as the appropriate Arkansas law"); *Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992) (concluding without analysis that punitive damage award of $700,000 was reasonably related to actual damages of $60,000 because "[a] rational jury could have found that the nature of the defamation, [defendant's] culpability, and the public's sense of justice required [defendant] to pay substantial exemplary damages" and defendant "failed to demonstrate that the exemplary damage award is a result of the jury's passion rather than its reason"); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (upholding award of $1,000 compensatory and $500,000 punitive damages, concluding that "[i]f there are *any* circumstances of probative force that support the amount of the [punitive damage] award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*.") (emphasis in original); *Principal Financial Group v. Thomas*, 585 So. 2d 816, 818 (Ala.) (upholding compensatory damage award of $1,000 and punitive damage award of $750,000, finding a reasonable relationship based in part on the "greviousness" of a harm that is "too small to obtain lawyers who can afford to file suit"), *cert. denied*, 112 S. Ct. 649 (1991).

duct, the defendant's financial situation, and whether the award of punitive damages bears a "reasonable relationship" to the compensatory damages and to the actual and likely resulting harm. *TXO*, 419 S.E.2d at 887. As illustrated by the West Virginia Supreme Court of Appeals' decision, however, these standards fail to impose a sufficiently definite and meaningful constraint on the discretion of juries in awarding punitive damages, particularly in a libel context.

The *TXO* court analyzed the Alabama West Virginia standards by focusing primarily on what constituted a "reasonable relationship" between punitive and compensatory damages. The court concluded that a relationship of roughly five to one is reasonable for "really stupid" defendants,[20] when compensatory damages are neither negligible (in which case a much greater proportion would be permissible) nor very large (when a smaller proportion might be in order). For "really mean" defendants,[21] on the other hand, the court determined that virtually no proportion is required. Rather, the award of punitive damages against such a defendant is evaluated under a reformulation of the remaining factors, specifically:

> (1) the potential harm that [the defendant's] actions could have caused; (2) the maliciousness of [the defendant's] actions; and (3) the penalty necessary to discourage [the defendant] from undertaking such endeavors in the future.

Id. at 889.

Particularly in the First Amendment context, these standards afford far too little protection against abuse. Protected speech often may be "harmful" to some persons and beneficial to others. The media unavoidably publish

[20] "By really stupid defendants, we signify those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness—in most cases caused by a foul-up in the middle of some corporate bureaucracy that has pushed some victim into a red-tape limbo." *Id.* at 888.

[21] "By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful." *Id.* at 889.

" 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (quoting *New York Times*, 376 U.S. at 270) (citation omitted). Such speech cannot be protected if media defendants risk being labeled as "really mean" simply because they exercise their constitutional rights in furtherance of their role in our democratic society.

Even if media defendants somehow could be meaningfully categorized as "really stupid" or "really mean," such standards would not protect First Amendment values. Under the West Virginia court's test, a punitive damage award assessed against a "really stupid" defendant need bear "roughly" a five to one proportion to the compensatory damages (including general or presumed damages) unless those compensatory damages are negligible—in which case virtually no proportion is required. Only if the compensatory and punitive damages are both very large might the court impose a smaller proportion.

Such variable proportionality to compensatory damages imposes no practical limit on punitive damages, particularly when compensatory damages for libel are largely subjective and often arbitrary. *See Gertz*, 418 U.S. at 349. In practical effect, a large punitive damage award would be upheld against a "really stupid" media defendant unless that award is significantly larger than an enormous compensatory damage award. This "proportionality" scheme thus gives an appearance of fairness while virtually guaranteeing that all but the most monstrously excessive punitive damage awards will be upheld on review.

The standard for reviewing punitive damages awarded against "really mean" media defendants would include even fewer safeguards. Rather than relying on a possibly discernible "reasonable relationship," the reviewing court assesses only (1) the potential harm that could result from the defendant's speech, (2) its maliciousness, and (3) the penalty necessary to discourage future speech.

Assessing the reasonableness of punitive damages based on the *potential harm* to *anyone* that *could* have resulted from the defendant's speech, however, limits such awards only to the reviewing court's imagination and ability to speculate on the existence and amount of possible damages to unknown persons. *See TXO*, 419 S.E.2d at 889 (finding that TXO's conduct "could potentially cause millions of dollars in damages to other victims"). "Maliciousness," the second factor, apparently means little more than relying on the size of the jury's award to determine the degree of reprehensibility, *see id.* ("the jury's verdict says more than we could say in an opinion twice this length"), and the third factor, the penalty necessary to discourage future conduct, will depend on the financial resources of the defendant. *See id.* at 889-90 (evaluating the estimated net worth of TXO's parent corporation and concluding that "an award of this magnitude is necessary to discourage TXO from continuing its pattern and practices of fraud, trickery and deceit"). "[N]o test relating to 'fairness' in the abstract . . . would approve this procedure, unless it is whether something even more unfair could be imagined." *Pacific Mutual*, 111 S. Ct. at 1053 (Scalia, J., concurring in the judgment).

Such elusive standards of review, moreover, are inconsistent with appellate courts' "duty to 'independently decide whether the evidence in the record is sufficient to cross the constitutional threshold' " marked by the First Amendment. *Harte Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (quoting *Bose*, 466 U.S. at 511). The Court in *Bose* explained that a jury's application of First Amendment principles

> "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail."

466 U.S. at 510 (quoting *Monitor Patriot*, 401 U.S. at 277 (quoting *New York Times*, 376 U.S. at 270)) (citation omitted). The threat of unrestrained damages

equally jeopardizes First Amendment interests, *Dun & Bradstreet*, 472 U.S. at 770 (White, J., concurring), and the appellate court's duty under *Bose* to protect against the entry of judgments that encroach upon protected speech logically extends to judgments of punitive damages as well. *See Bose*, 466 U.S. at 511.

Judges, like juries, also can find neutrality difficult in the context of unpopular or personally offensive speech. *See, e.g., Peoples Bank and Trust Co. v. Globe Int'l, Inc.*, 786 F. Supp. 791, 795 (W.D. Ark. 1992) (characterizing the defendant's publication as "what reasonable jurors might find is muck, mire and slime spewed forth by defendant"), *aff'd in part and remanded in part on other grounds*, 978 F.2d 1065 (8th Cir. 1992). Yet, the court of appeals in *Peoples Bank and Trust*, under a "manifest abuse of discretion" standard, remanded the "shockingly inflated" *compensatory* damage award of $650,000 for "substantial remittitur" but simultaneously upheld the *punitive* damage award of $850,000 without independent analysis. The court simply deferred to the jury determination because "[i]n formulating its instructions, the district court adequately considered the criteria set forth in [*Pacific Mutual*], as well as appropriate Arkansas law." *Peoples Bank and Trust Co. v. Globe Int'l Publishing Co.*, 978 F.2d 1065, 1071 (8th Cir. 1992); *See Brown v. Petrolite Corp.*, 965 F.2d 38, 49 (5th Cir. 1992) (upholding punitive damage award of $700,000 as reasonably related to actual damages of $60,000 and concluding that defendant "failed to demonstrate that the exemplary damage award is a result of the jury's passion rather than its reason"). First Amendment values cannot be, and are not being, protected under the deferential review accorded punitive damages by courts interpreting the general due process standards approved in *Pacific Mutual*.

Whether the conduct at issue in a libel suit could possibly justify the imposition of enormous civil fines meant to deter speech in the future is a determination that cannot be reviewed solely for whether a jury acted out of "passion and prejudice," or whether the amount is "excessive," or even whether it bears some "rational relationship" to harm

caused in the past. The First Amendment requires far more precise limits. "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Connaughton*, 491 U.S. at 686. The precise limits on punitive damages mandated by the First Amendment remain to be explored in an appropriate future case, and the Court should expressly reserve defining those limits for such a case. Deferential appellate review, however, does not guarantee compliance with general due process concerns—much less the heightened due process standards required in a First Amendment context—so long as juries retain discretion to punish and to deter speech through awards of punitive damages.

CONCLUSION

Punitive damages as currently awarded in libel cases are fundamentally inconsistent with First Amendment values. Even if standards for imposing such damages without infringing protected speech might be devised in a future case, the standards applied by the West Virginia Supreme Court of Appeals provide little due process protection in the ordinary case, and clearly would not satisfy the heightened due process that would be required in a First Amendment case. Under the West Virginia standards, juries in libel cases involving public controversies would remain free to punish unpopular views with no meaningful restraints. Punitive damage awards imposed under such conditions are a remedy that society cannot afford and that the Constitution does not permit.

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Capital Cities/ABC, Inc. through its subsidiaries, owns national radio and television networks, television and radio stations, daily and weekly newspapers, and other publications, all of which are engaged in the gathering and dissemination of news to the public.

Dow Jones & Company, Inc. publishes, inter alia, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, *the Dow Jones News Services* and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and nondaily newspapers, business publications and hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

Knight-Ridder, Inc. is an international information and communications company engaged in newspaper publishing, business news and information services, news, graphics and photo services, cable television, and newsprint manufacturing. Knight-Ridder publishes 29 daily newspapers, including *The Philadelphia Inquirer*, the *San Jose Mercury News*, *The Miami Herald*, and the *Detroit Free Press*.

National Broadcasting Company, Inc., itself and its subsidiaries, own and operate a national television network and television stations, all of which are engaged in the gathering and dissemination of news to the public.

The Philadelphia Inquirer and the *Philadelphia Daily News* are newspapers of general circulation, published in Philadelphia, Pennsylvania, by Philadelphia Newspapers, Inc., a subsidiary of Knight-Ridder, Inc.

Reuters America Inc. is the primary North American operating company of Reuters Holdings PLC, the international news and financial information organization. Reuters supplies information to both business subscribers and to the news media. It obtains its information from approximately 160 exchanges and over-the-counter markets, from data contributed directly by more than 3,715 subscribers in 82 countries and from a network of some 1,270 journalists and photographers.

Time Inc. is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE, and ENTERTAINMENT WEEKLY.

Tribune Company is a communications company owning the *Chicago Tribune*, Orlando *Sentinel*, the Fort Lauderdale *Sun-Sentinel*, the Escondido, California *Times-Advocate*, the Palo Alto *Times-Tribune*, the Newport *News*, Virginia *Daily Press*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta, New Orleans, and Philadelphia.

The American Society of Newspaper Editors is a nationwide professional organization of more than 900 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, text books and educational materials. Its more than 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers including university presses and scholarly associations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership 196 domestic magazine publishers who publish over 800 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

The Newsletter Publishers Association, Inc. ("NPA") represents 650 publishers of newsletters and specialized information services. The NPA has long worked to preserve the First Amendment rights of newsletter and other publishers.

The Newspaper Association of America ("NAA") represents approximately 1,525 daily newspapers representing more than 90 percent of the newspaper circulation in the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

Radio-Television News Directors Association is the principal professional association of electronic journalists

in the United States. The Association's members gather, edit and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists is a voluntary, non-profit organization of 14,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORPORATION, *Petitioner*
v.
ALLIANCE RESOURCES CORPORATION, TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE, *Respondents*

On Writ of Certiorari to the Supreme Court of West Virginia

BRIEF FOR THE AMERICAN TORT REFORM ASSOCIATION, THE ASSOCIATION FOR CALIFORNIA TORT REFORM, THE ALABAMA CIVIL JUSTICE REFORM COMMITTEE, THE MINNESOTA CIVIL JUSTICE COALITION AND THE TEXAS CIVIL JUSTICE LEAGUE AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

This brief will address the following question:

Whether the punitive damages award in this case violates the requirements of substantive due process because it exceeds any amount that is rationally related to the purposes of punishment and deterrence.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-479

TXO PRODUCTION CORPORATION,

Petitioner

v.

ALLIANCE RESOURCES CORPORATION, ET AL.,

Respondents

On Writ of Certiorari to the Supreme Court of West Virginia

BRIEF FOR THE AMERICAN TORT REFORM ASSOCIATION, THE ASSOCIATION FOR CALIFORNIA TORT REFORM, THE ALABAMA CIVIL JUSTICE REFORM COMMITTEE, THE MINNESOTA CIVIL JUSTICE COALITION AND THE TEXAS CIVIL JUSTICE LEAGUE AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The American Tort Reform Association ("ATRA"), which was founded in 1985, is a broad-based, bipartisan coalition of more than 400 businesses, corporations, municipalities, associations, professional firms and public interest and consumer groups who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in civil litigation.

The Association for California Tort Reform ("ACTR") is dedicated to educating the public about ways to improve California's civil liability system in terms of fairness, efficiency, economy,

uniformity, and certainty. Founded 15 years ago as a non-profit corporation, ACTR presently has close to one thousand members representing business, the professions, local government and individual citizens.

The Alabama Civil Justice Reform Committee is an association of Alabama business and professional organizations who are concerned with the current state of the civil justice system.

The Texas Civil Justice League, created in 1986, is a 2300 member organization of individuals, municipalities, associations and corporations in Texas who are seeking reform of the civil justice system.

The Minnesota Civil Justice Coalition is comprised of business associations, professional groups, governmental associations and individual companies who believe that significant reform of the civil justice system is needed.[1]

SUMMARY OF ARGUMENT

The principles that govern the excessiveness issue should not be in dispute. For a century it has been clear that the Due Process Clause imposes substantive limits on the size of civil penalties in litigation between private parties. The applicability of those constraints to punitive damages was made clear in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1046 (1991), where the Court stated that punitive awards may not be "greater than reasonably necessary to punish and deter." That standard takes its content from the primary substantive guarantee of the Due Process Clause: protection against actions of government that are irrational or inconsistent with the basic values that underlie our society.

The imposition of punitive damages in an amount that bears no reasonable relationship to the nature and magnitude of the defendant's misconduct accordingly cannot stand; whether viewed in terms of retribution or of deterrence, it is a fundamental tenet of

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

our system that a greater wrong should be punished more severely than a lesser one. Several factors are relevant in considering the allowable severity of punishment: the character of the defendant's conduct, the gravity of the harm caused by that conduct, the anticipated or actual gain to the defendant, and the sanctions for analogous conduct set forth in civil and criminal statutes. On the other hand, the financial condition of a corporate defendant -- which has little bearing either on culpability or on the sanction needed to deter -- is of distinctly limited relevance. And in any case, the jury's verdict, when made without the guidance provided by a legislatively established punishment range, is due only modest deference.

Application of these principles to this case makes clear that the punitive verdict was so excessive as to be unconstitutional. TXO's conduct, which constituted an obscure tort that was not established in West Virginia law until the decision in this case, was hardly a grave offense. TXO obtained no gain from its actions. The harm suffered by respondents was minimal. The jury was exposed to, and surely was influenced by, evidence of TXO's net worth. And the punitive award was vastly greater than the statutory penalties in West Virginia and other jurisdictions for more serious misconduct than that engaged in by TXO. In these circumstances, nothing justifies a punitive award that is more than 500 times greater than the compensatory recovery.

In saying this, we appreciate that there is a natural judicial reluctance to apply substantive constitutional limits in a manner that restricts specific punishments. But the Court has done so in the past under both the Due Process Clause and Eighth Amendment, and judges regularly engage in line-drawing with respect to allegedly excessive verdicts in the remittitur context. It therefore is both necessary and appropriate for the Court to address the problem of excessive punishment that this and similar cases present.

ARGUMENT

THE PUNITIVE DAMAGES IN THIS CASE VIOLATE DUE PROCESS BECAUSE THEY ARE NOT RATIONALLY RELATED TO THE GOALS OF PUNISHMENT AND DETERRENCE

The award of punitive damages at issue in this case is, in many ways, astounding. Even granting the correctness of the lower court's factual findings, this case involves nothing more than a run-of-the-mill business tort: TXO filed an assertedly frivolous quitclaim deed and then brought an insubstantial quiet title action to use as leverage in negotiating a more favorable royalty agreement with respondents. See Pet. App. 17a-20a. This wrongful act did not cause -- or threaten to cause -- physical injury to persons or property; it did not pose a risk of harm (physical or economic) to the public at large; it did not involve criminal conduct of any kind. Indeed, the only out-of-pocket "loss" inflicted upon respondents was the $19,000 they paid in attorney's fees to defend the quiet title suit and to launch their own counterclaim. But the jury nevertheless awarded, and the court below affirmed, a punitive judgment of $10 million, an amount more than 500 times greater than the actual injury that respondents suffered.

While such a $10 million "private fine" (as the Court has termed punitive damages, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) for an unexceptional tort that caused only minimal harm seems remarkable, there is one respect in which it is not extraordinary: as the size of punitive damage awards has grown exponentially in recent years, more and more of them -- like the judgment in this case -- have borne no discernible relationship to the gravity of the defendant's misconduct. See generally, *e.g.*, P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 127 (1988); M. Peterson, *et al.*, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 65 (1987). In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991), the Court accordingly noted its "concern about punitive damages that 'run wild.'" But the constraints on the discretion of juries and reviewing courts that were recognized in *Haslip* have not abated the flow of "staggering" judgments. *Id.* at 1066 (O'Connor, J., dissenting). Even a cursory review reveals that, in the less than two

years since *Haslip* was decided, dozens of seven- and eight-figure punitive awards have survived at least one level of judicial review.[2] It may well be that some of those awards were justified, of course, but the continuing upward spiral has begun to produce results that, as the Court has put it, "jar one's constitutional sensibilities." *Id.* at 1043.

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[2] See, *e.g.*, *The Narrows, L & L Enters.* v. *Gotham Ins. Co.*, No. 3AN-89-09272 (Alaska Super. Ct. 1991) ($60 million punitive; $1 million compensatory); *Proctor* v. *Upjohn Corp.*, No. 84 L 3213 (Ill. Circuit Ct. Sept. 3, 1992) ($35 million punitive after remittitur; $3 million compensatory), app. pending; *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991) ($28 million punitive after remittitur; $390,000 compensatory); *Sheridan* v. *Northwestern Mut. Life Ins. Co.*, No. CV-89-2505-PR (Ala. Circuit Ct. Apr. 10, 1992), app. pending, No. 1911110 ($26 million punitive; $800,000 compensatory); *Polar Equip.* v. *Brunswick Corp.*, No. 3AN873826 CV (Alaska Super, Ct. 1991) ($25.3 million punitive; $9.47 million compensatory) (case settled while on appeal); *Dunn* v. *Owens-Corning Fiberglass*, 774 F. Supp. 929 (D.V.I. 1991) ($25 million punitive; $1.3 million compensatory), aff'd in part and vacated in part, 1992 U.S. App. LEXIS 22749 (3d Cir. 1992) (damages not disturbed); *General Chem. Corp.* v. *De La Lastra*, 815 S.W.2d 750 (Tex. Ct. App. 1991) ($15 million punitive; $6.5 million compensatory); *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) ($12.5 million punitive after remittitur; $9.025 million compensatory), cert. denied, 112 S. Ct. 1941 (1992); *Braswell* v. *ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991) ($9.1 million punitive; $4.5 million compensatory); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 779 F. Supp. 994 (W.D. Ark. 1991) ($8 million punitive; $750,000 compensatory), aff'd, 979 F.2d 1301 (8th Cir. 1992); *General Motors Corp.* v. *Johnston*, 592 So.2d 1054 (Ala. 1992) ($7.5 million punitive after remittitur; $75,000 compensatory); *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) ($6.1 million punitive; $2.59 million compensatory), cert. denied, 112 S. Ct. 1778 (1992); *Hughes* v. *Consol-Pa. Coal Co.*, 945 F.2d 594 (3d Cir. 1991) ($5.5 million punitive; $5.36 million compensatory), cert. denied, 112 S. Ct. 2300 (1992); *Banco do Brasil, S.A.* v. *Latian, Inc.*, 285 Cal. Rptr. 870 (Cal. Ct. App. 1991) ($5 million punitive after remittitur; $5.5 million compensatory); *Defender Indus., Inc.* v. *Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) ($5 million punitive; $106,514 compensatory); *Borden, Inc.* v. *De La Rosa*, 825 S.W.2d 710 (Tex. Ct. App. 1991) ($1.5 million punitive; $553,288 compensatory).

Those awards, moreover, have done more than impose arbitrary and excessive sanctions on particular defendants. By setting punishments that are entirely out of line with the threatened harms, they have deterred socially beneficial behavior and led to grotesque misallocations of resources. See generally II American Law Institute, Reporters' Study, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 234 (1991); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 858-860 (1989). It thus is well-documented that the threat of excessive punitive liability has led to the discontinuance of products and the termination of useful research in fields such as pharmaceuticals and general aviation, among others. See *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282-283 (1989) (O'Connor, J., concurring in part and dissenting in part); P. Huber & R. Litan, eds., THE LIABILITY MAZE (1991).

In its challenge to one such excessive award, TXO demonstrates that the procedures used below were constitutionally inadequate, and we fully subscribe to its analysis on that score. Our focus, however, is on the other issue it presents: whether TXO was denied the *substantive* rights guaranteed it by the Due Process Clause because the punishment in this case is wholly disproportionate to the company's wrongful conduct and does not rationally advance the purposes for which punitive damages are exacted. We urge the Court to reach this issue even if it finds that flawed procedures were used below. Procedural reform alone is not a complete answer to the problem of constitutionally excessive punitive damages;[3] by devoting attention to the substantive side of the issue now, the Court could pretermit what otherwise is sure to be voluminous and unnecessary litigation.

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[3] As the brief for amicus Business Council of Alabama demonstrates, the procedural regime in Alabama, which was cited by the Court in *Haslip* as an acceptable model, has not prevented the entry of excessive punitive judgments.

A. THE DUE PROCESS CLAUSE PROHIBITS DISPROPORTIONATE AND IRRATIONAL PUNITIVE EXACTIONS

1. Punitive Damages That Are Arbitrary And Irrational In Amount Deprive The Defendant Of Property Without Due Process

The principles that govern the excessiveness issue should not be in dispute. For a century it has been clear that the Due Process Clause imposes substantive limits on the size of civil penalties in litigation between private parties. See *Browning-Ferris*, 492 U.S. at 276; *id.* at 280-281 (Brennan, J., concurring); *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490-491 (1915); *Missouri Pac. Ry.* v. *Tucker*, 230 U.S. 340, 351 (1913); *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909); *Missouri Pac. Ry.* v. *Humes*, 115 U.S. 512, 523 (1885). That principle has been used to invalidate statutory penalties that are "grossly out of proportion to the possible actual damages" and thus "so arbitrary and oppressive that [their] enforcement would be [unconstitutional]." *Tucker*, 230 U.S. at 351.

Haslip made clear that similar constraints apply to the imposition of punitive damages. In drawing the line between the "constitutionally acceptable and the constitutionally unacceptable," the Court explained that punitive judgments must be governed by "general concerns of reasonableness." 111 S. Ct. at 1043. In fact, the Court held Alabama's procedures for the award of punitive damages constitutionally adequate because it believed that the Alabama courts, by measuring the size of the award against the culpability of the defendant, the harm caused by the defendant's conduct, the profitability of that conduct, and similar factors, "ensure[] that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at 1045; see *id.* at 1044. Implicit in that procedural holding is the substantive requirement that "a particular award [cannot be] greater than reasonably necessary to punish and deter" (*id.* at 1046); otherwise, the particular nature of Alabama's judicial review and the considerations taken into account by its courts would have been beside

the point. Indeed, the Court in *Haslip* concluded its opinion by itself conducting a constitutional excessiveness review and finding, "after careful consideration," that the judgment did "not cross the line into the area of constitutional impropriety." *Ibid.* (footnote omitted).

The crucial question here, then, is not whether the Due Process Clause imposes substantive limits on the size of punitive damage awards; that point has been settled. Instead, the central question for the Court is how to determine whether a given award exceeds those limits.

2. A Punitive Award Is Arbitrary And Irrational When It Is Disconnected From The Factors That Have Been Understood To Justify Punishment

The appropriate standard for the substantive due process inquiry was stated many years ago in cases like *Missouri Pac. Ry. v. Tucker* and was restated in *Haslip*: it involves determining whether the punitive exaction is "greater than reasonably necessary to punish and deter." *Haslip*, 111 S. Ct. at 1046. But stating the standard is easier than applying it. When does the size of the punishment exceed that "necessary to punish and deter"? The question threatens to become circular. The answer, after all, necessarily turns on the degree of deterrence and retribution thought appropriate. If it were reasonable to seek absolute deterrence and limitless retribution, no amount of punishment would be more than is "reasonably necessary," since increasing the punitive award simply increases the level of retribution and deterrence achieved by the award's imposition. Yet implicit in the concept of "reasonable necessity" is the understanding that punishments -- which when high enough deter far more legitimate than illegitimate conduct -- become constitutionally *unreasonable* when they reach a certain level. Unfortunately, it is difficult, without some external point of reference, to say that the amount of deterrence and retribution accomplished by any particular award has reached that point.

Failure to seek such a point of reference, however, leads to a complete abdication of the judicial responsibility to assure that state action is compatible with the Due Process Clause. It would mean, to adapt a familiar example that the Court has used in a closely related setting, that a jury could return a punitive award of $1

million (or $10 million, or $100 million) against a corporation whose employee was guilty of overtime parking in the plaintiff's parking lot. Cf. *Solem* v. *Helm*, 463 U.S. 277, 311 n.3 (1983) (Burger, C.J., dissenting); *Hutto* v. *Davis*, 454 U.S. 370, 374 n.3 (1982); *Rummel* v. *Estelle*, 445 U.S. 263, 274 n.11 (1980). Or if the defendant in such a suit were an individual rather than a corporation, the jury could transfer to the plaintiff the defendant's house and all of his possessions as a penalty for overtime parking. Could such a punishment really be rational? As Justice Powell has noted, while a penalty of that magnitude "might well deter vehicular lawlessness, * * * it would offend our felt sense of justice." *Rummel*, 445 U.S. at 288 (dissenting opinion).

The prospect of enormous awards for trivial offenses, however, is not wholly hypothetical. Whatever the likelihood that a legislature would depart so far from rationality in setting sanctions (compare *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2696-2697 (1991) (opinion of Scalia, J.), with *id.* at 2714 (White, J., dissenting)), there can be no comparable confidence that individual juries, which have no experience with use of the legal system to administer punishments, will be constrained by the "general concerns of reasonableness" found controlling in *Haslip*.[4] The remarkable judgment returned in this case seems to prove the point. Yet allowing such judgments to stand on the theory that rationality or reasonableness necessarily is in the eye of the beholder would

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[4] Jury awards are, of course, subject to judicial review. But common law review of punitive judgments is conducted under a highly deferential standard. In Alabama (which has become a post-*Haslip* model for other States), for example, the law establishes a "presumption of correctness of the jury verdict." *Armstrong* v. *Roger's Outdoor Sports, Inc.*, 581 So.2d 414, 421 (Ala. 1991). Indeed, the Alabama Supreme Court -- acting four days after this Court handed down its decision in *Haslip* -- held invalid under the state constitution a provision of Alabama's tort reform statute that would have eliminated the presumption of correctness for purposes of post-trial and appellate review. See *id.* at 415, 421. Meanwhile, the upward spiral of awards has a ratchet effect for purposes of review, as reviewing courts find record awards justified by reference to other recent high awards. Cf. *Browning-Ferris*, 492 U.S. at 278-279 n.24.

mean that there is no protection for the hapless defendant who loses all of his possessions over some minor misdeed.

Of course, as the Court noted in *Haslip*, drawing a line between "the constitutionally acceptable and the constitutionally unacceptable" may often be a difficult matter that requires close analysis of the facts of particular cases. 111 S. Ct. at 1043. But the Court has found similar inquiries manageable in the closely related settings of the Eighth Amendment's Cruel and Unusual Punishments and Excessive Bail Clauses. See *Harmelin*, 111 S. Ct. at 2702-2703 (opinion of Kennedy, J.), citing, *e.g.*, *Solem* v. *Helm*, *supra*; *Enmund* v. *Florida*, 458 U.S. 782 (1982); *Coker* v. *Georgia*, 433 U.S. 584 (1977); and *Weems* v. *United States*, 217 U.S. 349 (1910) (proportionality review under the Cruel and Unusual Punishments Clause); *United States* v. *Salerno*, 481 U.S. 739, 754 (1987) (Excessive Bail Clause); *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951) (same). The Court also has found it within the judicial competence to determine whether legislation advances the statutory purposes sufficiently to be judged rational under the Due Process and Equal Protection Clauses.[5] And courts historically have engaged in similar inquiries (albeit outside the constitutional context) when ordering common law remittiturs. In these and many other areas, the Court, despite the difficulty of the judgments involved, has found it "necessary to draw a line." *Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968). See *Solem*, 463 U.S. at 294. Drawing such a line also is appropriate here.

In our view, the analysis in this case should be built on the principle that undergirds *Haslip*: the understanding that the

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[5] The Court has not hesitated to invalidate enactments found irrational under either Clause. See, *e.g.*, *Railroad Retirement Board* v. *Alton R. R.*, 295 U.S. 330, 350 (1935) (due process); *id.* at 389 (Hughes, C.J., joined by Brandeis, Stone, and Cardozo, JJ., dissenting) (agreeing that statutory provision is "arbitrary and beyond the power of Congress"); *Allegheny Pittsburgh Coal Co.* v. *Webster County Comm'n*, 488 U.S. 336 (1989) (equal protection); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 440 (1982) (opinion of Blackmun, J.) (same); *id.* at 443 (Powell, J., concurring in the judgment) (same); *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (same); *Lindsey* v. *Normet*, 405 U.S. 56, 78 (1972) (same).

primary substantive guarantee of the Due Process Clause is protection "'against arbitrary action of government.'" *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The Clause thus gives force to "'the basic values that underlie our society'" (*Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-123 (1989) (plurality opinion), quoting *Griswold* v *Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment)), invalidating government actions that are "oppressive and 'violate the rudiments of fair play.'" *Chicago & N.W. Ry.* v. *Nye Schneider Fowler Co.*, 260 U.S. 35, 44 (1922). Measured against this standard, a punitive exaction must be deemed fundamentally unfair when it is disconnected from those factors -- such as the gravity of the injuries caused by the offense, the reprehensibility of the defendant's conduct, and the relationship of the sanction to the need to discourage future misconduct -- that historically have been understood to justify punishment. And a punitive judgment plainly is irrational when it greatly exceeds the penalties thought appropriate in all analogous settings. With this in mind, we briefly sketch the factors that should be considered in determining whether punitive damages are so disproportionate to the defendant's misconduct as to violate due process.

B. PUNITIVE DAMAGES ARE DISPROPORTIONATE AND IRRATIONAL IF THEIR AMOUNT BEARS NO REASONABLE RELATIONSHIP TO THE NATURE AND GRAVITY OF THE DEFENDANT'S CONDUCT

In assessing the propriety of punishment, one consideration was given prominent treatment in *Haslip* (see 111 S. Ct. at 1045-1046) and has been deemed dispositive by a plurality of the Court in the closely related context of the Cruel and Unusual Punishments Clause: the relationship between the sanction and the gravity of the defendant's misconduct. See *Harmelin*, 111 S. Ct. at 2705-2707 (opinion of Kennedy, J.). The reason for this is plain. Any rational system of deterrence must take account of the gain to the wrongdoer and the loss to society attributable to the wrongful act. And so far as just retribution is concerned, "it is a precept of justice that punishment * * * should be graduated and proportioned to offense." *Weems*, 217 U.S. at 367. See *Solem*,

463 U.S. at 284 ("[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence"). This fundamental tenet has been recognized in Anglo-American law at least since the time of Magna Carta (see note 10, *infra)* and rests on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952).[6]

There are several established guideposts that are useful in measuring the gravity of an offense for the purpose of assessing the appropriate punishment. This Court's decisions applying the Eighth Amendment and substantive due process are helpful, as are common law standards developed to resolve excessiveness challenges to punitive damages awards. These sources suggest that a punitive exaction is disproportionate to the offense when it lacks any reasonable relationship to the *character* of the defendant's misdeeds, to the *injury* caused by the defendant's action, or to the actual or potential *gain* to the defendant. While all of these considerations will not be applicable or of equal weight in every instance, the excessiveness of an exaction in relation to any of these benchmarks is strongly suggestive of constitutional infirmity.

1. The Character Of The Defendant's Conduct

In analyzing the character of the defendant's conduct, an initial consideration is the "severity" of the wrong. See generally RESTATEMENT (SECOND) OF TORTS § 908(2) (the punishment must bear some relation to the "character of the defendant's act"). There is, for example, a societal consensus that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem*, 463 U.S. at 292-293. Similarly, offenses threatening "'the health and welfare of our population'" fall on the

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[6] See, *e.g.*, J. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179-182 (1892 ed.); J. Braithwaite & P. Pettit, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 148 (1990); H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 9, 25 (1968); A. Sadurski, GIVING DESERT ITS DUE 237-238 (1985); A. Von Hirsch, DOING JUSTICE 66 (1976); Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726, 727 (1983); Mundle, *Punishment and Desert*, 4 PHIL. Q. 216, 221 (1954).

grave end of the spectrum. *Harmelin*, 111 S. Ct. at 2705 (opinion of Kennedy, J.) (citation omitted). More generally, misconduct involving injury to individuals or destruction of property, threats to health or safety, public corruption, injury to a large number of persons or oppression of especially vulnerable victims, or criminal activities of any kind warrants more serious punishment than run-of-the-mill economic torts.[7]

In judging the gravity of misconduct, the degree of the defendant's culpability also is crucial. Cf. *Haslip*, 111 S. Ct. at 1045. Where the defendant is a corporation or other organization, its level or extent of culpability depends upon the nature of its complicity in the wrongful conduct. If the conduct was undertaken pursuant to corporate policy or was approved by high-ranking officers, a relatively greater sanction would be justified, both because the corporation could in such a case fairly be said to be more culpable and because higher-level corporate actors have the capacity to commit greater wrongs in the name of the corporation. If, on the other hand, the misconduct is the act of lower-level employees, the organization's culpability, and the appropriate sanction, would be less. See generally FEDERAL SENTENCING GUIDELINES § 8C2.5(b); MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962); Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991). Similarly, where the defendant is an organization whose members or owners consist principally of persons wholly innocent of the alleged wrongdoing, courts should be sensitive to the unfairness of imposing an excessively large punishment upon blameless individuals. See *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Indeed, this consideration suggests that deterrence, rather than retribution, is the

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[7] See *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991), cert. denied, 590 A.2d 158 (Md. 1991); *The Post Office* v. *Portec, Inc.*, 913 F.2d 802, 810 (10th Cir. 1990), vacated on other grounds, 111 S. Ct. 1299 (1991), vacated and appeal dismissed on other grounds, 935 F.2d 1105 (10th Cir. 1991); *Machine Maintenance & Equip. Co.* v. *Cooper Indus.*, 661 F. Supp. 1112 (E.D. Mo. 1987); *Mutual Life Ins. Co.* v. *Estate of Wesson*, 517 So.2d 521 (Miss. 1987), cert. denied, 486 U.S. 1043 (1988).

policy principally served by the punishment of corporate defendants.

2. Injury To The Victim And Gain To The Defendant

a. Just as the character of the defendant's conduct is relevant, so too is the extent of the injury inflicted (or threatened) by that conduct; looking to the magnitude of the injury relates to the judgment that society's interest in deterrence increases as the scope and gravity of the harm increases. *Haslip* thus praised the Alabama system because it appeared to ensure that punitive awards "have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. See *Harmelin*, 111 S. Ct. at 2706 (opinion of Kennedy, J.) (substantial punishment justified when "crime threatened to cause grave harm to society"); *Solem*, 463 U.S. at 293 ("[t]he absolute magnitude of the [harm involved] may be relevant").[8] Indeed, the Court concluded its opinion in *Haslip* with the observation that the punitive award there, which was only some four times the amount of the compensatory damages, "may be close to the line" of "constitutional impropriety." 111 S. Ct. at 1046.

This conclusion reflects the general sense that a punitive award should not be orders of magnitude larger than the associated compensatory damages. When establishing punitive civil penalties, for example, legislatures traditionally have awarded no more than treble damages (as Congress did, for example, under the antitrust laws, RICO, and the Lanham Act). And commentators have suggested that punitive damages be considered presumptively excessive if more than three times the compensatory judgment.[9] A much

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[8] Many of the Court's decisions addressing the consistency of civil penalties with the requirements of substantive due process have referred to the size of the actual damages. Compare, *e.g.*, *Life & Casualty Ins. Co.* v. *McCray*, 291 U.S. 566, 573 (1934) (sustaining penalty for wrongfully withholding payment because the penalty amount bore a "reasonable proportion" to the possible actual damages), with *Tucker*, 230 U.S. at 351 (penalty invalid because "grossly out of proportion to the possible actual damages").

[9] See, *e.g.*, American College of Trial Lawyers, REPORT ON PUNITIVE DAMAGES 15 (1989); ABA Special Comm. on Punitive Damages, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 6-10 to 6-12 (1986).

higher ratio of punitive to actual damages accordingly is a clear warning sign that the punitive award may be excessive and must receive close scrutiny.

This proposition is not in the least incompatible with the Court's indication in *Haslip* that the relationship between compensatory and punitive damages does not provide "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 111 S. Ct. at 1043. Deterrence, after all, often may be substantially achieved by the payment of compensatory damages alone. See *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 312-313 (1986) ("Deterrence * * * operates through the mechanism of damages that are *compensatory*" and 42 U.S.C. 1983 "presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations"); *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting); Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1003, 1060 (1981); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931). That is particularly so where the compensatory payment is not disgorgement of gain from the tort (because there was no gain) but instead represents pure loss to the defendant. Whether the required payment in such circumstances is labelled compensatory or punitive, it has a similar impact on the defendant and therefore a similar deterrent effect. In such circumstances, large compensatory damages, far from justifying an increased punitive award, would actually render substantial additional penalties less rational. See, *e.g.*, *Crookston* v. *Fire Ins. Exchange*, 817 P.2d 789, 810 (Utah 1991).

On the other hand, where the injury is slight or only nominal, basing the penalty on the amount of compensatory damages is likely to be inadequate to provide appropriate punishment and deterrence. The Court recognized as much in *St. Louis, I.M. & S. Ry.* v. *Williams*, *supra*. There the penalty imposed pursuant to statute ($75 for a $.66 overcharge) was held not to be excessive because no individual passenger would have an incentive to sue for such

minimal actual damages (the case was decided before the advent of class actions) and because the railroad could wrongfully obtain substantial profit from "the numberless opportunities for committing the offense." 251 U.S. at 67. See also *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907).

In the typical case, however, the size of the compensatory award, while not necessarily determinative of the question whether the punitive judgment offends the Due Process Clause, is highly relevant. Although we believe there is much merit to the suggestion that punitive damages be considered presumptively excessive if greater than a prescribed multiple of the amount of compensatory damages, we acknowledge that a punitive award should neither be conclusively unconstitutional simply because it is more than three (or so) times the compensatory award nor conclusively constitutional because it is less than a trebled compensatory award. Arbitrariness and irrationality can be rooted out of the present punitive damages system only if the Court establishes a due process standard that eschews fixed formulas and instead requires a case-specific analysis of the rationality of the jury's verdict.

b. The flip side of injury to the victim is gain to the defendant; the greater the anticipated gain from a tort, the greater the penalty needed to provide appropriate disincentives for its commission. Cf. *Haslip*, 111 S. Ct. at 1045 (noting that Alabama courts consider "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss"). And again, the punishment inflicted by a punitive damages verdict may be so far out of line with the amount that the defendant gained or reasonably could have expected to gain from its misconduct as to suggest irrationality. See *United States* v. *Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987); Dobbs, *Ending Punishment in "Punitive Damages": Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 874-875 (1989); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1319 (1976). In such circumstances, it would be impossible to justify the amount of punitive damages as necessary or appropriate to achieve an adequate level of deterrence. See Bentham, at 179-181; Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1179 & n.69 (1989).

3. The Relevance Of Wealth

In contrast, it should be emphasized that one factor stressed to the jury in this case (see Pet. App. 40a-42a) and relied upon by the court below (see *id.* at 36a-37a, 39a) should be viewed with great skepticism when made part of the punitive damages equation: the net worth and size of the defendant. The importance of confining the role of "wealth" in the punishment calculus was twice suggested by the Court in *Haslip*. In upholding the instructions given in that case as not unconstitutionally vague, the Court stressed that "[a]ny evidence of [the defendant's] wealth was excluded from the trial in accord with Alabama law." 111 S. Ct. at 1044. And the Court reemphasized the point when it expressed approval of the post-verdict judicial review conducted by the Alabama courts, which gives only a limited role to the defendant's wealth: "While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045.

There is, of course, a strong historical basis for considering poor financial condition as a *mitigating* factor in setting monetary punishments.[10] And wealth may justify enhancing punitive damages for *individuals*, especially when they commit torts or crimes that do not have a purely economic motivation. In such cases, rational deterrence requires "monetarizing" the value to the

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[10] The roots of this practice may be traced back to the Magna Carta, which had as one of its central purposes the regulation of civil fines, known as amercements, imposed by the early English courts. See *Browning-Ferris*, 492 U.S. at 269-271. The Magna Carta required proportionality in punishments, guaranteeing that a person should "not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense." Magna Carta, ch. 20, reprinted in W. McKechnie, *Magna Carta* 284 (2d ed. 1914). But it also provided that even in cases of "grave offenses" the amount must "yet sav[e] always" the wrongdoer's means of livelihood to sustain himself and his family. *Ibid.* See *Browning-Ferris*, 492 U.S. at 271.

individual of the misconduct. See *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61 (1982); Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 65 (1990). See generally 1 Ghiardi & Kircher, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.36 (1981 & 1990 Supp.) (citing cases).

It does not follow, however, that the defendant's wealth or size is always a legitimate factor in setting punishment. To the contrary, scholarly opinion on the subject is virtually unanimous in the view that the link between wealth and deterrence breaks down when applied to large, publicly held corporations. As stated by a group of prominent legal scholars serving as reporters for the ALI's study of possible revisions of the Restatement of Torts:

> In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question. * * *
>
> Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.

II American Law Institute, Reporters' Study, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, at 254-255.

There are several reasons why financial condition is of little relevance to rational punishment of large, publicly held corporations -- or, for that matter, of labor unions, religious organizations, or other institutional entities. A publicly held institution is "not wealthy in the sense that persons are" (*Zazu*, 979 F.2d at 508); rather, it is a collection of shareholders (often pension funds investing on behalf of individual retirees) and employees whose personal wealth has little relation to the aggregate size of the corporation. At the same time, because corporate torts customarily are motivated by the desire for economic gain, punishment should be sufficient if it removes the prospect of gain from wrongful behavior. And the overall size of a business has little bearing on the way its employees behave; because there is little or no

difference in the motivation of large and small corporations to increase the company's profits, a profit-removing punishment should be equally effective regardless of the company's size. As Judge Easterbrook wrote for the Seventh Circuit, "General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none." *Id.* at 509. See generally Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1176-1177 (1989); *Symposium Discussion, Punitive Damages*, 56 S. CAL. L. REV. 155, 190-191 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler).[11]

Having said that, we do not mean to suggest that the Due Process Clause is "an economic primer on what factors best further the goals of punishment and deterrence" (*Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part)) or that the States should not be recognized to possess considerable leeway in determining how to accomplish their purposes. We therefore urge no blanket constitutional rule precluding any consideration of a corporate defendant's financial condition in the punishment calculus, though we think that the case for adopting such a rule as a matter of sound policy is overwhelming. But rationality remains the constitutional touchstone, and the defendant's wealth provides at best a weak reed on which to support a materially enhanced damage award. At some point, a punishment that rests primarily on such a reed loses any rational relationship to the purposes of retribution and deterrence that support the exaction of punishment; the penalty ceases to "fit the crime," but instead punishes a large entity simply for its status -- "as if having a large

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[11] The United States Sentencing Commission, after studying the subject for several years, recently promulgated guidelines for sentencing organizations convicted of committing federal crimes. Those guidelines assign corporate financial condition no role in setting punishment.

net worth were the wrong to be deterred!" *Zazu*, 979 F.2d at 508. See *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451 (1920); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273-274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Cf. *Robinson* v. *California*, 370 U.S. 660 (1962). In such a case the punitive award is nothing more than a transfer of wealth from a large (and typically impersonal) defendant to a sympathetic (usually local) plaintiff. Cf. *Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring in the judgment). "[T]aking the property of one and bestowing it on another" in that fashion is inconsistent with the Due Process Clause. *Alton*, 295 U.S. at 350.

4. The Deference Due The Jury's Verdict

a. One additional consideration should be borne in mind when assessing a jury's award of punitive damages. In reviewing the rationality of state action under the Due Process and Equal Protection Clauses, and in evaluating challenges to punishment under the Eighth Amendment, the Court is accustomed to giving the greatest deference to legislative judgments. The Court has recognized that setting aside such judgments "requires rejection [of] the collective wisdom of the [state] Legislature and, as a consequence, the [State's] citizenry," something that is appropriate "only in the most extreme circumstance." *Harmelin*, 111 S. Ct. at 2708 (opinion of Kennedy, J.). In contrast, the judgment of an individual jury -- typically reviewed by a trial judge under a highly deferential standard (see note 4, *supra*) -- stands on an entirely different footing.

A legislature's decision to authorize the imposition of a particular sanction for a particular type of misconduct reflects a finding -- either explicit or implicit -- that there is a reasonable relationship between the sanction and the misconduct. A legislature has the ability to gather relevant facts, ascertain and express the values of the community, and devise a proportional system of sanctions by considering each offense as part of the broader universe of wrongful conduct and fixing the proper relationship between various categories of offenses. A legislature also is in a position to act for the State in answering the "difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order." *Harmelin*, 111 S. Ct.

at 2703 (opinion of Kennedy, J.). As a consequence, issues relating to "severity of punishment * * * are peculiarly questions of legislative policy" (*Gore* v. *United States*, 357 U.S. 386, 393 (1958)), and the legislature's determinations in this area command "'substantial deference.'" *Harmelin*, 111 S. Ct. at 2703-2704 (opinion of Kennedy, J.), quoting *Solem*, 463 U.S. at 290.

Such deference is appropriate, however, only when the legislature has in fact authorized the sanction under review. As Justice Brennan observed in *Browning-Ferris*, "scrutiny of awards made without benefit of a legislature's deliberation and guidance [should] be less indulgent than * * * consideration of those that fall within statutory limits." 492 U.S. at 281 (concurring opinion).

Yet that is precisely the situation of a jury that hears only a single punitive damages case. Such a jury considers its case in isolation and in retrospect. Unlike a legislature, a jury lacks the information and expertise needed to place the particular defendant's actions in context and has no knowledge of the scale of punishments to which other wrongdoers are subjected. An unguided jury is therefore much less likely than a legislature to be able to devise a punishment that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. Indeed, the jury is far less able even than the "single jurist" whose judgment was set aside in *Solem* (see *Harmelin*, 111 S. Ct. at 2708 (opinion of Kennedy, J.)) to make determinations about appropriate punishment, for jurors have no experience in meting out judicial punishments and no sense of how other defendants typically are punished for similar misconduct. Courts accordingly should give little deference to the jury's determination when it is not situated "within a range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring).

b. The preceding discussion points up a useful frame of reference in assessing the rationality of a punishment determined by a jury: the sanctions set forth in relevant criminal and civil penalty statutes. For the reasons just discussed, the legislature's judgment in setting criminal fines and civil penalties -- which, like punitive damages, are designed to further the goals of punishment and

deterrence[12] -- is presumptively reasonable. Those punishments therefore furnish a powerful objective standard for a court to use in analyzing the reasonableness of a punitive damages award.

We do not suggest that juries generally should be constrained dollar-for-dollar by the analogous legislative penalty; *Haslip* made that much clear. See 111 S. Ct. at 1046. There are sensible reasons why a punitive damages verdict might rationally exceed that penalty: for one, the statutory sanction might have been set many years before and not brought into line with contemporary circumstances; for another, the tort plaintiff's role as private attorney general might justify a higher award than is appropriate when the State itself brings suit. Surely, however, if the punishment meted out by a jury vastly exceeds the penalty range established by the legislature in analogous areas, that is a telling sign that the award is disproportionate.

At the same time, such comparisons are more probative in the area of punitive damages than they are under the Eighth Amendment -- where they continue to have a substantial role. See *Harmelin*, 111 S. Ct. at 2707 (opinion of Kennedy, J.); *Solem*, 463 U.S. at 291-292; *Weems*, 217 U.S. at 380-381. In the Eighth Amendment setting, disparities in the sentencing schemes of the States "are the inevitable, often beneficial, result of the federal structure" (*Harmelin*, 111 S. Ct. at 2704 (opinion of Kennedy, J.)); that fact reduces the value of inter-jurisdictional comparisons. By contrast, the penalties set by the legislature of a State provide a useful benchmark (indeed, the single most objective benchmark) to employ in judging awards returned by juries *in that State*.

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[12] Two other goals of the criminal law, incapacitation and rehabilitation (see *Harmelin*, 111 S. Ct. at 2704 (opinion of Kennedy, J.)), have no application to corporate defendants.

C. THE PUNITIVE DAMAGES IMPOSED IN THIS CASE ARE EXCESSIVE

Application of these principles to the punitive damages in this case makes clear that the verdict was so excessive as to be unconstitutional. As a preliminary matter, the jury's determination of the size of the punishment is not entitled to substantial deference. The amount of the judgment was not chosen from a legislatively prescribed spectrum of permissible penalties for the kind of wrong TXO was found to have committed. Because the punitive damages award thus represents the view only of a single jury, with no experience of any kind in selecting punishments, and exercising unlimited and basically unguided discretion regarding the appropriate sanction, highly deferential review is not appropriate. With that in mind, an examination of the relevant factors establishes that the judgment here is insupportable.

First, TXO's conduct hardly constituted a grave offense. The tort here involved no violence, no injury to individuals or destruction of property, no threat to the public health or safety, no public corruption, no injury to a large number of persons or oppression of the especially vulnerable. Indeed, it involved no criminal conduct of any kind, which suggests that society does not view it as deserving special opprobrium. Cf. *Younger* v. *Harris*, 401 U.S. 37, 55 n.2 (1971) (Stewart J., concurring). In fact, it was not even clear that TXO's conduct was tortious at the time it was undertaken; the conduct ultimately was held to constitute an obscure civil wrong, slander of title, that had not been recognized in West Virginia until the decision by the state supreme court *in this case*. See Pet. App. 13a ("there is no West Virginia case on record directly recognizing an action for slander of title"). TXO's actions therefore barely register on the reprehensibility scale.[13]

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[13] The court below suggested that TXO had engaged in a "pattern and practice of fraud, trickery and deceit." Pet. App. 40a. The evidence of this "pattern" consisted of the testimony of four lawyers who had brought suits against TXO in other fora. *Id.* at 21a-24a. Of the suits that were the subject of this testimony, three appear to have settled (see *id.* at 22a-24a); only one was resolved on the merits -- and in that case the jury found *for TXO*. See *id.* at 24a. It is manifest that West Virginia should

Second, TXO obtained no gain from its actions. It did not obtain the favorable royalty agreement that purportedly was the goal of its scheme. To the contrary, the $19,000 compensatory judgment -- which represented respondents' legal expenses -- was not the disgorgement of wrongful profits but pure loss to TXO.

Third, the harm inflicted by TXO's conduct was minimal. Respondents suffered no out-of-pocket loss at all in the usual sense of that term; the attorney's fees that were the subject of the compensatory award are, as the court below acknowledged, "[o]rdinarily * * * not considered damages." Pet. App. 20. Yet while the compensatory judgment awarding attorney's fees was not trivial, the punitive award exceeded that judgment by a factor or more than *500*. This is, then, not a case in which the punitive award has "some understandable relationship to compensatory damages" (*Haslip*, 111 S. Ct. at 1045) or is supported by "objective criteria" of reasonableness. *Id.* at 1046. If the four-to-one ratio of punitive to compensatory awards in *Haslip* was "close to the line" of constitutional impropriety (*ibid.*), the 526-to-one award here is off the court and into the stadium parking lot.

The court below ran through a set of remarkable verbal gymnastics in its attempt nevertheless to justify this extraordinary ratio of punitive to compensatory damages. It acknowledged that the Due Process Clause generally precludes punishments that exceed the compensatory judgment by a ratio of more than five-to-one in the cases of "really stupid defendants" (Pet. App. 37a-38a), by which the court evidently meant defendants who engaged in what is conventionally termed reckless or grossly negligent conduct. See *id.* at 53a-54a (McHugh, C.J., concurring). But for what the court termed "really mean defendants" (that is, those who have acted knowingly), it declared that the sky is the limit; punitive damages against such defendants, the court concluded, may be returned at a ratio of 500-to-one -- or, evidently, in any amount at all. See *id.* at 36a, 39a. The court defended this disparity in the treatment accorded "really stupid" and "really mean" defendants on grounds

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not punish TXO for conduct in other States that has been fully resolved (through the medium of settlement) or that was found not to have been wrongful at all.

of deterrence rather than of culpability, explaining that "[w]hen the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant." *Id.* at 39a. The court added that "[t]he appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention." *Ibid.*

This analysis, however, is manifestly irrational. The theory that underlies the award of punitive damages for purposes of deterrence is that a potential wrongdoer will refrain from wrongdoing (either intentional wrongdoing or a refusal to take precautions that would prevent injury from reckless conduct) when the benefits derived from the wrongdoing are outweighed by the likely penalty (discounted by the possibility of escaping punishment). Assuming that both "mean" and "stupid" defendants act rationally -- and the court below offered no reason to suppose that a coherent regime of punishment could be constructed on some other foundation -- no larger sum is needed to deter one than the other. While differences in levels of *culpability* might justify greater retribution for "mean" than for "stupid" defendants, that was not the rationale offered by the court below for its affirmance of the award here. And needless to say, an arbitrary award should not be upheld because a reviewing court was able to articulate an irrational basis on which to justify it.[14]

Fourth, other telltale signs of a disproportionate punishment are present here. The jury was exposed to, and was told by the trial judge that it could consider, the corporate defendant's net worth. See Pet. App. 40a-42a; R. 73 (jury instructions telling jurors they could consider "the wealth of the perpetrator"). Given

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[14] The court below suggested that the type of action undertaken by TXO in this case "could potentially cause millions of dollars in damages to other victims." Pet. App. 40a. This conclusory assertion is without support in the record. It also is logically insupportable. If TXO's quitclaim deed was indeed frivolous, TXO never could have succeeded in "steal[ing] [respondents'] land" (*id.* at 20a) and respondents (or others in their position) could have cleared their title with a minimum of expense, as in fact happened in this case. And, of course, if the deed was not frivolous punishment is not justified at all.

the urgings of respondents' counsel and the size of the verdict,[15] it is almost certain that respondents "enjoy[ed] a windfall because they ha[d] the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.[16] At the same time, the award is grossly disproportionate to the statutory penalties in West Virginia and other jurisdictions for *more serious misconduct* than that engaged in by TXO.[17]

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[15] As is typical in cases like this one, respondents' trial counsel emphasized TXO's net worth in his argument to the jury. Among other things, he stated: "This is a multi-million dollar corporation -- even a billion dollars in assets. When you think about fining this defendant, a corporation of this magnitude and this size, ladies and gentlemen, what would it take to keep them from doing this again? It's going to take a lot more than awarding those attorney's fees. It's gonna take a lot more than that. This corporation, a multi-million dollar corporation, ought to be fined in terms of what they understand that goes to their resources and their resources are in the millions." R. 758.

[16] For its part, the court below was of the view that a corporate defendant's *size* may justify a larger punitive award, at least when the defendant is "really stupid." The court explained that "one of the reasons we allow punitive damages in these 'stupid' cases is to give individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." Pet. App. 36a. While this analysis evidently had no bearing here because the court characterized TXO as "really mean," it is worth noting how nonsensical the court's approach is. Its rationale went as follows: "The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.)" *Id.* at 37a. The court went on to conclude that a higher punitive award would "increase the likelihood that settlement decisions will be made by upper management employees." *Id.* at 38a. The court thus appears to have reasoned that enormous damages are justified against large defendants because middle managers can be counted on to act contrary to their employers' interests by fomenting (and then refusing to settle) litigation against those employers. This is hardly a rational ground on which to justify awards against large corporations that would be held unconstitutional against small ones.

[17] The West Virginia criminal offense most similar to the conduct

In sum, the gravity of the wrong was not great. It produced no gain for the defendant and only minimal harm to the plaintiffs. No other extraordinary factors justify substantial punishment. In these circumstances, the punitive award must be set aside as constitutionally excessive.

D. INTERVENTION BY THIS COURT IS ESSENTIAL

Having said all this, and notwithstanding the force of the arguments favoring the application of substantive due process here, we recognize that there is a natural judicial reluctance to announce substantive constitutional limits on punitive exactions. The appropriate lines, after all, concededly are difficult to draw with precision, for the governing standard is disturbingly imprecise. And perhaps more significant, the Court has never in the past found it necessary to grapple with the issue directly. That may leave the Court with a question posed by Justice Scalia during the argument in *Haslip*: why, given that punitive damages have been awarded for 200 years, is judicial intervention in the punitive damages area necessary now?

The answer, in our view, is that the truly enormous and irrational punitive award is a problem that is entirely a product of this

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engaged in by TXO involves making a false statement of the "financial condition" of the speaker or "any other person, firm, or corporation"; that offense is a misdemeanor punishable by a maximum fine of $500, although imprisonment also is possible for an individual defendant. W. Va. Code Ann. § 61-3-23 (Michie 1992). Larceny and theft of money or services by false pretenses likewise is subject to a maximum fine of $500. W. Va. Stat. Ann. §§ 61-3-13, 61-3-24. The highest criminal fine available in the State appears to be $10,000 for computer fraud. W. Va. Stat. Ann. § 61-3C-4. The highest penalties authorized by other States for embezzlement, larceny, and theft generally range from $10,000 to $100,000, with some States providing an alternative fine of two or three times the defendant's gain. Only Arizona authorizes higher monetary sanctions -- fines of up to $150,000 for individuals (see Ariz. Rev. Stat. § 13-801) and $1 million for corporations (see Ariz. Rev. Stat. § 13-803). But these maxima, which are fixed by general sentencing provisions applicable to a wide variety of offenses, reflect the legislature's judgment regarding the appropriate sanction for the most severe felonies. They accordingly provide no support whatever for the result here.

generation. We have reviewed punitive awards returned during the first 150 years of the nation's history;[18] with the exception of cases involving wrongful death, the largest punitive award that we uncovered in an extensive study of reported 19th century decisions -- including punitive awards that were set aside as excessive -- was $4500.[19] This sum, worth approximately $58,000 in 1987 dollars, is strikingly small by present-day standards. Most reported 19th century punitive awards, even those involving serious injuries, were much smaller.

The size of punitive exactions remained modest during the first half of this century. Writing in 1930, Dean McCormick noted what he described as several "startlingly large verdicts of punitive damages": one for $50,000, one for $33,333.33 (reduced to $10,000), and one for $12,650 (reduced by $5000).[20] While these sums certainly were significant amounts of money at the time -- the largest, which included compensatory damages for libel, was worth some $332,000 in 1987 dollars -- they would pass virtually unnoticed today. Twenty-five years after Dean McCormick's article, in 1955, the largest punitive damages verdict in California history and one of the two largest in the history of the United States still was only $75,000. See Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, INS. L.J., May 1980, at 257, 259 (1980).

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[18] Much of the research summarized here was presented to the Court in detail in the brief for The American National Red Cross, *et al.*, as *amici curiae*, in *Browning-Ferris*, No. 88-556.

[19] *New Orleans, J. & Great N.R.R.* v. *Hurst*, 36 Miss. 660 (1859). Indeed, so far as we have been able to determine, the largest 19th century judgment in which punitive and compensatory damages were *combined* was $20,000. *Caldwell* v. *New Jersey Steamboat Co.*, 47 N.Y. 282-283 (1872) (plaintiff passenger was "maimed and crippled for life" by an exploding steamboat boiler). Because that award (and others of similar magnitude) involved a serious injury, the compensatory portion presumably was large.

[20] McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L. Rev. 129, 149 & n.114 (1930), citing *Duncan* v. *Record Publishing Co.*, 143 S.E. 31 (S.C. 1927); *Livesley* v. *Stock*, 281 P. 70 (Cal. 1929); *Seaman* v. *Dexter*, 114 A. 75 (Conn. 1921).

Indeed, as recently as 1976, as Justice O'Connor noted in *Browning-Ferris*, the largest punitive damages judgment affirmed by an appellate court in a products liability case was $250,000; since then, awards more than 30 times as high have been sustained on appeal. See 492 U.S. at 282 (concurring and dissenting opinion). The award here is 40 times as high -- and is more than two full orders of magnitude larger than the largest award returned a single generation ago.

The Court must address the issue, moreover, because state legislation has not proved to be a uniformly effective answer to the problem of excessive punishments. While a number of States have enacted useful reforms of the punitive damages process, others have not acted -- and in some States punitive damages reform legislation has itself been struck down as inconsistent with state constitutional provisions.[21] The problem that confronts the Court, in any event, is not one that lends itself to correction by the States. The difficulty here is not so much that punitive damages are being awarded in increasing numbers of cases (although they are, see *Haslip*, 111 U.S. at 1066 (O'Connor, J., dissenting)); the problem is that astonishing awards are being returned against a relatively small number of defendants. And as the West Virginia Supreme Court itself has noted, the cases presenting such awards typically pit local plaintiffs against "out-of-state (often faceless, publicly held) corporations." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W. Va. 1991). This is not a problem that is likely to obtain a sympathetic hearing from state legislatures. Defendants, meanwhile, are being denied their federal rights as juries return arbitrary and irrational punitive awards.

As for the problem of line-drawing, that concededly is difficult to do with any great precision. Indeed, at the margins it may be impossible to articulate why an award of one amount is appropriate

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[21] See, *e.g.*, *Armstrong* v. *Roger's Outdoor Sports, Inc.*, *supra*; *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Kirk* v. *Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991). See generally 2 Ghiardi & Kircher, *supra*, § 21.16 at 83 ("[t]he majority of courts that have considered caps for noneconomic loss have held them to be unconstitutional").

and a slightly larger one is not. Cf. *Solem*, 463 U.S. at 294. But that does not justify judicial inaction in the face of arbitrary and irrational punishments, just as similar line-drawing problems have not led the Court to withhold relief when irrational laws are challenged under the Equal Protection Clause or when grossly excessive punishments are attacked under the Eighth Amendment. And however difficult the question at the margins, judges surely are competent to determine when punitive awards are orders of magnitude larger than "reasonably necessary to punish and deter." This case demands such a determination.

CONCLUSION

The judgment of the West Virginia Supreme Court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-479

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorney's fees awards. *See, e.g., Haslip v. Pacific Mutual*, 111 S.Ct. 1032 (1991); *Farrar v. Hobby*, 113 S.Ct. 566 (1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (WLF, Working Paper Series No. 50, Nov. 1992); Victor E. Schwartz, *Punitive Damages: Should The*

Constitution Of The United States Provide Boundaries? (WLF Legal Backgrounder, May 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (WLF Legal Backgrounder, March 1989). Excessive and unpredictable punitive damages awards are ultimately harmful to the economy, workers, and consumers.

WLF believes that it can bring a broader perspective on the issues presented in this case which will assist this Court in deciding the case in such a way as to give clearer guidance to state courts on the imposition of punitive damages. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amicus curiae is, in the interest of brevity, omitting any detailed statement of the facts of this case. *Amicus* adopts by reference the statement of facts contained in Petitioner's brief.

Briefly, Petitioner TXO Production Corp. ("TXO") obtained and filed a quitclaim deed to certain property with respect to which TXO had an oil and gas exploration and production agreement with Respondent Alliance Resources Corporation ("Alliance"). Based on an assertion of rights under the quitclaim deed, TXO then filed an action to quiet title. Alliance counterclaimed, alleging that its right to the oil and gas estate in the property in question was unambiguous and that TXO's recording of the quitclaim deed constituted slander of title.

The trial court in the quiet title action ruled that TXO had no title to the property on the basis of the quitclaim deed it had obtained. On the counterclaim for slander of title, the jury awarded Alliance $19,000 in compensatory damages, consisting solely of the attorney's fees Alliance had incurred in the quiet title action. The jury awarded $10 million in punitive damages against TXO.

The West Virginia Supreme Court, in an opinion by Justice Neely, upheld the punitive damages award, rejecting TXO's due process challenge. Of particular relevance to this brief is the court's reasoning that (1) it

was within the trial judge's "sound discretion" to allow the jury to consider financial information concerning the worth of TXO's separately incorporated parent in determining the appropriate amount of punitive damages; (2) the appropriate ratio to consider for reviewing excessiveness of the punitive damages award was the ratio of $10 million in punitive damages to $19,000 in compensatory damages, the compensatory damages consisting entirely of attorney's fees; and (3) the punitive damages award was justified in part because the "type" of fraudulent activity undertaken by TXO "could potentially cause millions of dollars in damages to other victims." Pet. App. 40A.

SUMMARY OF ARGUMENT

This case illustrates the consequences of essentially standardless punitive damages determinations. A punitive award, by definition a punishment, has been meted out without safeguards of objective rationale or maximum amount to constrain the discretion of a juror or a judge who is out to do justice according to his or her own personal code. The author of the opinion below has been quite candid in another forum about the personal standards he brings to cases such as this:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 4 (1988).

The Due Process Clause of the Constitution cannot prevent injustice, but it does require that before a defendant may be deprived of property he must have an opportunity for an adjudication that is something other

than a sham. As a member of this Court has written: "As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean." Scalia, *The Rule Of Law As A Law Of Rules*, 56 U.Chi.L.Rev. 1175, 1179 (1989). While the Due Process Clause does not enforce strict adherence to this ideal of certainty, it does require adjudication according to articulated principles that are sufficiently clear to avoid "*ad hoc* and subjective decisionmaking. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). As Justice Scalia has written: "Statutes that are seen as establishing rules of inadequate clarity or precision are criticized, on that account, as undemocratic -- and, in the extreme, unconstitutional -- because they leave too much to be decided by persons other than the people's representatives." Scalia, *supra* at 1176. In this case the punitive damages award similarly left "too much to be decided" by the jury and reviewing court, and thus was more a product of whim than of objective and clear rules.

This *amicus* brief focuses on three aspects of this extreme case. First, the trial court and the West Virginia Supreme Court impermissibly allowed consideration of the wealth of TXO's separately incorporated, non-party parent arbitrarily and without otherwise applicable procedural protections. Notwithstanding the state's well developed policies respecting the corporate form, the court below gave no guidance as to the circumstances under which corporate formalities will be ignored so that evidence of a parent corporation's wealth is considered in awarding punitive damages.

Second, West Virginia law, like that of many states, recognizes that a punitive damages award is intended to provide additional compensation to the injured victim and to reflect actual harm done. The court below nonetheless refused to recognize that, under these criteria, the attorney's fees award in this case *reduced* the need for a punitive damages award. The West Virginia Supreme Court's "excessiveness" calculus thus was *ad hoc* and subjective in light of the state's criteria for determining

punitive damages, because it failed to lower the punitive-to-compensatory damages ratio in recognition of the separate attorney's fees award.

Third, the West Virginia Supreme Court used an utterly standardless inquiry into the potential harm that the "type" of conduct engaged in by TXO might cause, allowing speculation about conduct that has not yet occurred and the harm such conduct (by TXO or others) could cause an indeterminate number of victims. The court below referred to no evidence on this point; indeed the jury instruction itself did not allow consideration of likely harm from the conduct engaged in by TXO, let alone potential or conjectural harm from hypothetical future conduct by TXO or others.

The analysis of these three aspects of the West Virginia Supreme Court's $10 million punitive damages award suggests several neutral principles (to be used with others) to assist state courts in achieving adherence to meaningful, articulated standards in the award of punitive damages consistent with the Due Process Clause. First, a court's punitive damages calculus must not be arbitrary or capricious when considered in light of the whole body of relevant state law. Second, a court's procedures for calculating punitive damages and determining excessiveness must be consistent with the state's purposes in awarding punitive damages. And third, no factor which a state considers in determining punitive damages may call for or permit rank speculation by the jury or court.

ARGUMENT

I. WEST VIRGINIA'S PROCEDURES FOR IMPOSING PUNITIVE DAMAGES UPON CORPORATE ENTITIES ARE ARBITRARY AND FUNDAMENTALLY UNFAIR

Before the courts of West Virginia may issue a judgment depriving a party of property, they must afford the party all protections to which it is entitled under the

Due Process Clause of the Fourteenth Amendment.[1] *Hurtado v. State of California*, 110 U.S. 516, 537 (1884). ("[A]ny legal proceeding enforced by public authority... must be held to be due process of the law"). "The Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (citations omitted). "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Id.* As illustrated below and in the Petitioner's brief, West Virginia's system for imposing punitive damages against a corporation lacks the constitutionally required procedural protections that ensure fairness in decision making.

Fundamental fairness demands that procedural protections be in place prior to permitting a jury to consider evidence of a non-party corporation's wealth as part of its punitive damages calculation.[2] The West Virginia trial court below determined that in awarding punitive damages, the jury could properly consider the wealth of corporations that were not parties to the action, namely, TXO's parent corporations, USX and the TXO Division. The trial court's determination was not the result of reasoned application of West Virginia's corporations law or evidentiary law. Rather, the trial court's decision to permit the jury to consider the wealth of TXO's parent corporations, and the West Virginia Supreme Court's affirmation of this decision, was arbitrarily made, denying TXO and its parents the constitutional protections of the Due Process Clause.

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[1] The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any state deprive any person of life, liberty or property without due process of law.

[2] Petitioner argues that the wealth of the defendant is an improper basis for a punitive damages award. We agree. This discussion focuses on the even more arbitrary consideration of a non-party parent corporation's wealth.

The imposition of punitive damages without adequate procedural protections is not the only constitutional problem with the punitive damages award at issue here. Because it was based on irrelevant evidence of a non-party's wealth, the punitive damages award against TXO was excessive and not rationally related to West Virginia's stated goals of punishment and deterrence. The purpose of the Due Process Clause is "to exclude everything arbitrary and capricious in litigation affecting the rights of citizens." *Dent v. West Virginia*, 129 U.S. 114, 124 (1889). Criteria for determining penalties may not be so defined as to allow arbitrary and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The West Virginia Supreme Court's consideration of evidence of a non-party's wealth was arbitrary and impermissibly *ad hoc*, particularly when considered in light of the body of substantive law governing West Virginia's treatment of corporations. Accordingly, the punitive damages award against TXO transgresses fundamental principles of due process.

A. Permitting The Jury To Consider The Wealth Of TXO's Parent Corporations Without Any Finding That TXO's Parents Should Be Responsible Violated TXO's Due Process Rights

In order to afford a party its constitutional due process protections, the procedures used to award punitive damages must be reasonable. *Haslip v. Pacific Mutual*, 111 S. Ct. 1032, 1043 (1991). The jury must receive adequate guidance from the trial court so that jury discretion is not unlimited. *Id.* ("As long as [jury] discretion is exercised within reasonable constraints, due process is satisfied"). A state's procedural protections -- including trial court and appellate review -- should make certain "that punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 1044-45.

West Virginia's system for awarding punitive damages permits juries to consider evidence of a defendant's wealth. *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991). However, by failing to require a specific factual finding as to the corporate entity whose wealth is to be measured, West Virginia's system for determining punitive damages lacks the objective and meaningful criteria necessary to satisfy the Due Process Clause.

1. West Virginia Law Specifies That The Corporate Entity Cannot Be Disregarded Haphazardly

"The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders." *Southern Electrical Supply Co. v. Raleigh County National Bank*, 320 S.E.2d 515, 523 (W.Va. 1984). "In this jurisdiction [West Virginia], the rule is well established that the corporate entity cannot be disregarded haphazardly." *Atwater & Co., Inc. v. Fall River Pocahontas Collieries Co.*, 195 S.E. 99, 105 (W. Va. 1938). "Time and time again, courts have held that a corporation is an entity distinct from its stockholders. Equally, it is a general rule that the fact that the majority of stock of one corporation is owned by another corporation does not make the former the instrumentality of the latter." *Id.* at 104.[3]

Accordingly, West Virginia and most other jurisdictions[4] recognize the importance of observing the

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[3] Both the West Virginia Constitution and the West Virginia Corporation Act affirm the limited liability principle for corporations and their shareholders. West Virginia Constitution, Article XI, § 1; West Virginia Corporation Act, § 31-1-89.

[4] *See, e.g., Schenley Distillers Corporation v. United States*, 326 U.S. 432, 437 (1946); *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 769-70 (9th Cir. 1992) (applying federal 'common law' and California law); *Poulos v. Naas Foods*, (continued...)

distinctions between corporate entities, and have fashioned certain procedural tests to ensure that the corporate form is never disregarded haphazardly. A party seeking to hold a parent liable for the acts of its subsidiary must submit sufficient evidence to overcome the presumption that the parent and subsidiary have separate, independent entities, subject to the protections and advantages of the corporate form, such as limited liability. *Southern Electrical Supply Co.*, 320 S.E.2d at 524; *Southern States Cooperative, Inc. v. Dalley*, 280 S.E.2d 821, 827 (W.Va. 1981)(advantages of corporate form include "the limitation of personal liability, the continuity of corporate existence, and the facilitation of business administration"); 1 William M. Fletcher, Cyclopedia of the Law of Private Corporations, § 25 (perm. ed. rev. vol. 1990) (hereinafter "Fletcher") ("A 'subsidiary corporation' is one which is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of the capital stock. Notwithstanding the fact that the two corporations may be so related, each is deemed to have an independent existence").

West Virginia, like other jurisdictions,[5] does recognize that under certain exceptional circumstances the corporate form may be disregarded in order to avoid an unjust result. *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 97 (W. Va. 1986). The decision to hold one corporation responsible for the acts of the other involves "complicated factual proofs" and the test for making such a decision

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[4] (...continued)
Inc., 959 F.2d 69, 73-74 (7th Cir. 1992) (applying Wisconsin law); *Key v. Liquid Energy Corp.*, 906 F.2d 500, 503 (10th Cir. 1990) (applying Oklahoma law); *Tennessee Valley Authority v. Exxon Nuclear Co.*, 753 F.2d 493, 497-98 (6th Cir. 1985) (applying Tennessee law).

[5] *See, e.g., Schenley Distillers Corporation*, 326 U.S. at 437; *Ministry of Defense of the Islamic Republic of Iran*, 969 F.2d at 769-70; *Poulos*, 959 F.2d at 73-74; *Key*, 906 F.2d at 503; *Tennessee Valley Authority*, 753 F.2d at 497-98.

should be "applied gingerly." *Southern Electrical Supply Co.*, 320 S.E.2d at 517 n.5, 521.[6]

The party seeking to hold one corporation liable for the acts of another must show "that the corporation is so organized and controlled to be a mere adjunct or instrumentality of the other." *Id.* at 522 (citations omitted). In order to make this stringent showing, a party must present evidence to the court of numerous relevant factors such as inadequate capitalization, commingling of funds, and failure to maintain corporate formalities.[7] No one factor is determinative -- prior to a determination to disregard the corporate form, a court must examine all of these numerous factors in a totality of the circumstances test. *Laya*, 352 S.E.2d at 99.[8] "The mere showing that

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[6] The "instrumentality" rule, which is considered one of the alter ego doctrines, is employed to hold one corporation liable for the acts of another corporation that is within its total control. *Southern Electrical Supply Co.*, 320 S.E.2d at 521 n.9 (citing Fletcher, §§ 41.10, 43.10 (Perm. Ed. 1983 Rev.)). "The alter ego doctrines, alternatively 'instrumentality', 'identity,' 'agency,' 'piercing the corporate veil,' or 'disregarding the corporate fiction,' are designed to prevent injustice when the corporate form is interposed to perpetuate an intentional wrong, fraud or illegality." *Southern Electrical Supply Co.*, 320 S.E.2d at 521-522.

[7] In more detail these factors include: (1) inadequacy of capital structures; (2) whether corporate funds have been commingled; (3) whether corporate formalities have been followed; (4) whether funds from one corporation have been siphoned off to the other without regard to the harm caused either entity; (5) whether separate records have been maintained; (6) whether there has been total control and dominance of one corporation by another; (7) whether one corporation is a 'dummy corporation' with no business activity or purpose; (8) whether there has been a violation of law or public policy; (9) whether unity of interest and ownership causes one entity to be indistinguishable from another; and (10) whether the corporations share common shareholders, officers, employees and facilities. *Id. Laya*, 352 S.E.2d at 98-102; *Southern Electrical Supply Co.*, 320 S.E.2d at 523.

[8] This inquiry is so intensely factual, that it should "rarely be determined upon a motion for summary judgment." *Laya*, 352 S.E.2d at 102.

one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure." *Southern States Cooperative, Inc.*, 280 S.E. 2d at 827; *Atwater & Co., Inc.*, 195 S.E. at 104. Indeed, in determining the application of the instrumentality rule, "the test is the *exercise* of control by the parent company over the subsidiary company, and not the mere *opportunity* to exercise control." *Id.* (emphasis added).

Moreover, the West Virginia Supreme Court has instructed that the 'instrumentality rule' should be used both sparingly and carefully: "Courts should invoke the rule only with mature consideration and caution. Undue haste in the application of the rule to every case involving corporations would break down the entire corporation law of the country and would bring disastrous results." *Atwater & Co., Inc.*, 195 S.E. at 104. Fletcher's Cyclopedia Corporations agrees: "The importance of observing these [corporate] distinctions is great and pervades the whole law of corporations, being fundamental in many other rules of law." Fletcher, § 25. "Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362-63 (1944).[9]

2. *Despite The Stringent Test Established By West Virginia Law, The Courts Below Permitted The Jury To Disregard Corporate Forms Without Any Factual Findings Whatsoever In Violation Of Due Process*

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[9] *See also Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 980 (4th Cir. 1987) ("Business decisions proceed on the assumption of limited liability: courts foster stability in commerce by upholding the legitimate assumptions underlying business activity, not by overturning them"). As Chief Judge Cardozo cautioned in *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. Ct. App. 1926), when courts ignore the separation between subsidiary and parent and treat the two as one, "we thwart the public policy of the state instead of defending or upholding it."

The trial court permitted the jury to consider evidence, over TXO's objection, of TXO's parent corporations' wealth. More specifically, the trial court admitted the testimony of an expert who testified as to the wealth of the TXO Division of USX based upon a review of USX's annual report. USX's annual report identified the TXO Division of USX as being comprised of at least fifteen corporate entities other than TXO Production Corp., the named party in this litigation. Pet. App. 41A. Yet Alliance never argued or attempted to prove that USX or the TXO Division was ultimately responsible for the acts of TXO under the 'instrumentality rule' or any other alter ego doctrine. Indeed USX was not even the parent of TXO at the time of the events on which the punitive damages award is based. Pet. App. 40A-41A, n. 13. Alliance never argued that evidence of USX's or the TXO Division's wealth was relevant to the proceeding. The trial court never made any such findings. Rather, the trial court admitted this irrelevant and prejudicial evidence over TXO's objection, without reference to West Virginia law, which recognizes and maintains the limitations of the corporate form absent a showing of certain exceptional circumstances.[10]

The West Virginia Supreme Court upheld the trial court's decision to admit evidence of USX's and the TXO Division's wealth despite the fact that the trial court failed to make the determination that TXO was the 'alter ego' or

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[10] As a purported justification for presenting the evidence of USX's and the TXO Division's wealth, Alliance represented to the trial court that TXO had failed to disclose the net worth of TXO Production Corp. in answers to interrogatories. However, whether the interrogatories identified by Respondents called for such information is questionable, and in any event, Alliance never moved to compel a response to these interrogatories. The West Virginia Supreme Court notes that "TXO was not forthcoming during discovery" but makes no finding that it was appropriate to permit the jury to consider the wealth of a non-party corporation as a discovery sanction. Pet. App. 41A. The West Virginia Supreme Court's basis for considering the evidence is that "[t]he worth of the TXO Division of USX, and the worth of USX for that matter, is relevant." *Id.*

'instrumentality' of its non-party parents in accordance with West Virginia law. *Id.* The court held that the worth of the parents was relevant to the award of punitive damages against TXO, arguing that:

> If we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a member of undercapitalized subsidiaries. It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury must reach.

Id. Apparently forgetting that West Virginia had established an entire body of law to accommodate the corporation's interest in maintaining its form, and the public's interest in preventing the corporate form from being used to perpetrate injustice, the court below rationalized the decision to permit evidence of a non-party parent's wealth by stating that it was necessary to prevent the ability of a parent corporation to escape liability. *Id.*

The West Virginia Supreme Court's 'rationale' is absurd. Neither USX nor TXO Division were named parties to this litigation. Alliance never argued that USX or the TXO Division should be responsible for its subsidiary's acts, or in the court's words, that it was "the pocketbook of USX that the jury verdict must reach." *Id.* Accordingly, the determination to disregard TXO's corporate form to reach its parent corporations was never made, despite the fact that the West Virginia Supreme Court has affirmed and reaffirmed this determination as necessary prior to disregarding the corporate form. *Laya*, 352 S.E.2d at 97; *Southern Electrical Supply Co.*, 320 S.E.2d at 521-23; *Southern States Cooperative, Inc.*, 280 S.E.2d at 827; *Atwater & Co., Inc.*, 195 S.E.2d at 104-05. Instead, the West Virginia Supreme Court dispensed with decades of law and established procedural protections,

and affirmed the trial court's determination to admit irrelevant evidence of a non-party's wealth.[11]

In *Haslip*, the Court upheld Alabama's method for addressing punitive damages as constitutional because, *inter alia*, the jury instructions accommodated the defendant's interest in rational decision making, and Alabama's interest in the meaningful assessment of appropriate deterrence and retribution. *Haslip*, 111 S. Ct. at 1044. In addition, the jury's discretion was not unlimited, and confined to deterrence and retribution, the state policy concerns sought to be advanced. *Id.* And, as a matter of assessing the constitutionality of such discretion, the Court stated that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied." *Id.*

In affirming the constitutionality of Alabama's system, the Court also looked to "meaningful and adequate review by the trial court," and appellate review of the Alabama Supreme Court as "an additional check on the jury's or trial court's discretion." *Id.* at 1044-45. Appellate review makes certain that "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. *Id.* at 1045.

Here, however, the trial court's review and the West Virginia Supreme Court appellate review failed to provide

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[11] Perhaps recognizing that its nonchalant affirmation of the trial court's admission of this evidence directly contradicted its own established case law, the West Virginia Supreme Court, in a footnote, attempted its own cursory review of some of the factors relevant to an 'instrumentality' or 'alter ego' finding. Pet. App. 42A. This belated and insufficient review does not even begin to satisfy the rigorous test established and reaffirmed by the West Virginia Supreme Court in *Atwater & Co., Inc.*, *Southern States Cooperative, Inc.*, *Southern Electrical Supply Co.*, and *Laya*. There was no evidence presented to the trial court upon which to make any such decision. And even if the court did base its analysis on proper evidence, its review was superficial -- while "finding" that USX had the *power* to generally control the operations of TXO, it failed to address the critical factor of whether USX or the TXO Division *did* exercise control. *Atwater & Co., Inc.*, 195 S.E. at 104.

the constitutionally required "check" on the jury's and trial court's discretion. The trial court permitted the jury to consider evidence that was not rationally related to West Virginia's goals of retribution and deterrence. *See Garnes*, 413 S.E.2d at 909. In considering this evidence, the jury was permitted to punish TXO's non-party parents without any finding that TXO's parent entities should be responsible for the acts of TXO. *See Ramada Hotel Operating Company v. Shaffer*, 576 N.E.2d 1264, 1267 (Ind. Ct. App. 1991) (in admitting evidence of parent corporation's wealth without any evidence to support an alter ego or instrumentality finding, plaintiff was allowed to *punish* the parent for the wrongdoing of the subsidiary). The jury's ability to achieve such a result cannot be considered the product of "definite and meaningful constraint." *Haslip*, 111 S. Ct. at 1045.

In *Garnes*, the West Virginia Supreme Court expressly held that the financial position of the *defendant* is relevant in determining punitive damage awards. 413 S.E.2d at 909. According to West Virginia law, the wealth of the defendant is relevant to the deterrence function of punitive damages -- evidence of the defendant's wealth permits the jury to assess the proper amount necessary to discourage future bad acts. *Leach v. Biscayne Oil and Gas Co., Inc.*, 289 S.E.2d 197, 199 (W. Va. 1982). *See also Garnes*, 413 S.E.2d at 909; *Wells v. Smith*, 297 S.E.2d 872, 879 (W. Va. 1982). However, in considering evidence of the non-party parents' wealth, the fact-finder's discretion was not confined to the state policy concerns sought to be advanced, as mandated by *Haslip*. 111 S. Ct. at 1044. Simply stated, the financial position of a non-party was considered without any showing that such information would be relevant -- i.e., that the non-party should be responsible for the acts of the defendant.

What makes the trial court's failure to follow established corporate and evidentiary law even more egregious is that rather than providing an additional check on the jury's and on the trial court's discretion, the West Virginia Supreme Court affirmed the award, itself ignoring its own stated laws and policies. No procedure on appeal checked whether the trial court's admission of the evidence

was consistent with the purposes of punitive damages. The West Virginia Supreme Court set forth no general principle to guide whether evidence of a non-party parent corporation's wealth should be admissible. The appellate court left that determination to the "sound discretion" of trial judges. Here there was no "additional check on the jury's or trial court's discretion" whatsoever. *Haslip*, 111 S.Ct. at 1045. This utter lack of procedural protection renders the lower court's consideration of evidence of TXO's parent's wealth unconstitutional.

3. *Other Jurisdictions Recognize The Fundamental Unfairness of Permitting A Jury To Consider Evidence Of A Non-Party Parent's Wealth*

A number of state and federal courts have recognized the fundamental principle that "where a plaintiff seeks punitive damages against a subsidiary corporation, evidence of the wealth of the parent corporation is irrelevant and inadmissible unless the plaintiff can prove that the corporate veil should be pierced because the subsidiary was but the alter ego or mere instrument of the parent." Fletcher, § 43 (perm. ed. Supp. 1992). Numerous appellate courts have overturned or remitted punitive damages awards that were based on evidence of a non-party's wealth, holding that the jury's verdict was based on prejudicial and irrelevant evidence.[12]

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[12] *E.g.*, *Herman v. Hess Oil Virgin Islands Corporation*, 379 F. Supp. 1268, 1276 (D. St. Croix 1974), *aff'd*, 524 F.2d 767 (3d Cir. 1973), (size of parent company not relevant when assessing damages against the subsidiary); *HCA Health Services of Midwest, Inc. v. National Bank of Commerce*, 745 S.W.2d 120, 124 (Ark. 1988) (because subsidiary was sole party-defendant, and no reason was shown why their separate identifies should be disregarded, trial court erred in permitting appellees to refer to parent in quest for punitive damages); *Walker v. Dominick's Finer Foods, Inc.*, 415 N.E.2d 1213, 1216 (Ill. Ct. App. 1980) (nothing in record to warrant the admission of the financial figures of a non-party parent into evidence); *Cap Gemini America, Inc. v. Judd*, 597 N.E.2d 1272, 1286 (Ind. Ct. App. 1992) (continued...)

Permitting a jury to consider irrelevant and prejudicial evidence in awarding punitive damages is fundamentally unfair and constitutes a violation of a party's due process rights. *See Dowling v. United States*, 110 S. Ct. 668, 674 (1990) (recognizing that the admission of evidence may be so "extremely unfair that its admission violates fundamental conceptions of justice") (quotations omitted; citations omitted). The jury's consideration of irrelevant evidence of TXO's parents' wealth irreparably tainted the punitive damages award against TXO, such that the award jars "one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1043. In *Haslip*, the Court recognized that the imposition of punitive damages could violate the Constitution. *Id.* at 1043. Here, the imposition of punitive damages based upon the wealth of TXO's non-party parents without any determination that such evidence was in any way relevant to the proceedings -- was unconstitutional and cannot be permitted to stand.

The current practice of the states serves as a concrete indicator of what fundamental fairness and rationality require. *See Schad v. Arizona*, 111 S. Ct. 2491, 2500-01 (1991) (plurality opinion) (Court looked to history and current practice of states in order to determine adequacy of procedure at issue); *Hurtado*, 110 U.S. at 534. ("Due process of law is process according to the law of the land.

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[12] (...continued)
(evidence of wealth of parent is irrelevant and inadmissible in assessing punitive damages against a subsidiary where no finding that subsidiary was an alter ego or mere instrument of the parent); *Miller Brewing Company v. Best Beers of Bloomington, Inc.*, 579 N.E.2d 626, 641-43 (Ind. Ct. App. 1991) (same). *Ramada Hotel Operating Company*, 576 N.E.2d at 1267-71 (unknown and undetermined financial connection between parent and subsidiary fails to advance state purposes of punitive damage award); *Liberty Financial Management Corporation v. Beneficial Data Processing*, 670 S.W.2d 40, 51-2 (Mo. Ct. App. 1984) (trial court erred in admitting into evidence the financial statement of defendant's parent corporation). *See also A.L. Laboratories, Inc. v. Philips Roxane*, 803 F. 2d 378, 385-86 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1632 (evidence not sufficient to support award of punitive damages against parent on theory that parent should be held responsible for the acts of the subsidiary).

This process in the States is regulated by the law of the State"). West Virginia's own laws commanded that prior to permitting a jury to consider the wealth of a corporation's non-party parents, the trial court make a factual determination as to whether the subsidiary should be considered the alter ego or instrumentality of the parent. *Laya*, 352 S.E.2d at 97; *Southern Electrical Supply Co.*, 320 S.E.2d at 521-23; *Southern States Cooperative, Inc.*, 280 S.E.2d at 827; *Atwater & Co., Inc.*, 195 S.E.2d at 104-05. Without such a procedural protection, the jury's options in awarding punitive damages against TXO fell "beyond the constitutional bounds of fundamental fairness and rationality." *Schad*, 111 S. Ct. at 2504 (plurality opinion).

B. West Virginia's Practice Of Permitting Juries To Consider Evidence Of A Non-Party's Wealth Is Arbitrary And Subjective In Light Of The State's Policies With Respect To The Corporate Form

The West Virginia Supreme Court provided no standards for determining when a defendant's corporate form will be ignored and evidence of its parent's wealth admitted for a jury's consideration in determining punitive damages. As discussed above, the court left that determination to the trial judge's "sound discretion." Pet. App. 41A. The court below mentioned the possibility that a corporate defendant *could* be one of "a number of undercapitalized subsidiaries," but required no showing that that was in fact the case. *Id.* at 41A-42A. The court was convinced that "at the end of the chain of related companies, TXO has but one stockholder," but it provided no reason for departing from the "general rule that the fact that a majority of the stock of one corporation is owned by another corporation does not make the former the instrumentality of the latter." *Atwater*, 195 S.E. at 104-105.

Thus West Virginia has provided no means for determining when the corporate form will be respected and

when it will be ignored in a punitive damages proceeding. Such standardless review violates principles of due process.

> The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.

Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984).[13] None of the goals of due process articulated in *United States Jaycees* is satisfied by the West Virginia Supreme Court's decision in this case. The opinion of the court below cannot be reconciled with the policies respecting the corporate form that pervade other state decisional law. No "choice among competing social values" can be discerned. More importantly, the lower court's decision invites "caprice and discrimination" in the

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[13] In a closing footnote, the *Haslip* Court states that a "void-for-vagueness" analysis "is not helpful" because "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." 111 S.Ct. at 1046 n. 12. This Court in other cases has used a "void-for-vagueness" analysis to examine laws concerning imposition of penalties as such.

> [V]ague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.

United States v. Batchelder, 442 U.S. 114, 123 (1979). In any event, the principles articulated in cases such as *United States Jaycees* define the requirements of due process generally, and provide guidance beyond the confines of a strict "void-for-vagueness" approach

determination of punitive damages. "[L]aws must provide explicit standards for those who apply them" to avoid "resolution on an *ad hoc* and subjective basis. . . ." *Grayned*, 408 U.S. at 108-109.[14] And, as discussed above, the opinion of the court below provides no guidelines for "meaningful judicial review."

The Due Process Clause is meant "to exclude everything arbitrary and capricious in litigation affecting the rights of citizens." *Dent*, 129 U.S. at 123 (1889). Against the backdrop of decades of developed state law respecting the corporate form, the West Virginia Supreme Court's decision in this case is an *ad hoc*, arbitrary and subjective determination to depart from that law. The decision gives no guidance to prospective defendants, juries or trial courts as to when a parent corporation's wealth will be considered in future punitive damages determinations. The decision is fundamentally unfair to TXO and its non-party parent and does not meet minimal due process requirements.

II. WEST VIRGINIA'S PROCEDURES FOR CALCULATING A RATIO OF PUNITIVE TO COMPENSATORY DAMAGES WHEN ATTORNEY'S FEES HAVE BEEN AWARDED ARE ARBITRARY AND CAPRICIOUS IN LIGHT OF WEST VIRGINIA'S PURPOSES FOR AWARDING PUNITIVE DAMAGES

As discussed above, a state's procedures for determining a punitive damages award must assure "that

[14] Although *Grayned* involved a criminal statute, these same principles apply in the context of civil penalties. A "state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402 (1966). Although greater scrutiny may be appropriate depending on the severity of the penalty, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982), punitive damages, as their name implies, are intended to, and do, serve to punish. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

punitive damages are reasonable in their amount and *rational in light of their purpose* to punish what has occurred and to deter its repetition." *Haslip*, 111 S. Ct. at 1044-45 (emphasis added). But the West Virginia Supreme Court's consideration in this case of the appropriate ratio of $10 million in punitive damages to $19,000 in compensatory damages was arbitrary and irrational in light of West Virginia's articulated purposes for awarding punitive damages. Compensatory damages in this case consisted exclusively of attorney's fees awarded to Alliance. Yet no procedure provided any means for rationally relating the size of the punitive damages award to compensatory damages when a plaintiff already has been awarded the litigation expenses incurred in vindicating his rights.

The West Virginia Supreme Court calculated the ratio of punitive to compensatory damages without reducing the ratio in light of the fact that compensatory damages included attorney's fees. In doing so, it acted contrary to West Virginia's own articulated criteria for calculating punitive damages. Where (as in West Virginia) a purpose of awarding punitive damages is to provide additional compensation to an injured victim, or where (as in West Virginia) the award is required to be proportional to the actual harm done to the victim, a ratio of punitive to compensatory damages must be *lower* where the compensatory damages includes attorney's fees.

A simple example illustrates this principle. Suppose in a tort action, case 1, the plaintiff is awarded $10,000 in actual damages and the court finds that a ratio of punitive to actual damages of two-to-one is appropriate, awarding $20,000 in punitive damages. In a similar tort action, case 2, the plaintiff is awarded the same $10,000 in actual damages plus an additional $20,000 in attorney's fees. Assuming all else to be equal (the defendants' conduct, wealth, etc.), the plaintiff in the second case surely is *not* entitled to a $60,000 punitive damages award based on a two-to-one ratio of punitive damages to actual damages plus attorney's fees.

The reason for considering the ratio of punitive to actual damages in West Virginia as in most other states is

to provide some measure of proportionality between the punitive award and the harm done to the plaintiff. In the hypothetical example, the harm is not greater in the second case than in the first. To the contrary, in the second case the attorney's fees award makes the victim whole for the cost of vindicating his rights even before the punitive damages award. If anything, case 2 justifies a *lesser* punitive damages award than case 1. The West Virginia Supreme Court's consideration of the punitive to compensatory damages ratio here, entirely divorced from and in conflict with the purposes of a punitive damages award, violated due process.

A. TXO Was Deprived Of A Procedure That Rationally Related The Award Of Attorney's Fees To The Size Of The Punitive Damages Award.

In this case, the only compensatory damages awarded to the plaintiff consisted of a relatively modest $19,000 in attorney's fees -- the cost of Alliance's defense of TXO's quiet title action. Pet. App. 20A. The West Virginia Supreme Court in no way took account of the fact that compensatory damages consisted entirely of attorney's fees in considering the appropriate ratio of punitive to compensatory damages. The trial court's verdict means that Alliance suffered *no* compensable harm other than the need to defend title to its property. The attorney's fees award itself compensated Alliance for the cost of vindicating its rights. The court considered a ratio of punitive to compensatory damages (the compensatory damages consisting entirely of attorney's fees), taking no account whatever of the state's criteria for awarding punitive damages.

In West Virginia one rationale for the award of punitive damages is to provide additional compensation to the plaintiff for the trouble and cost of the lawsuit. For example, in *Garnes*, 413 S.E.2d at 909, the Supreme Court of West Virginia held that when a trial court reviews a jury's punitive damages award it should consider, among other factors: "The costs of litigation.

(We want to encourage plaintiffs to bring wrong-doers to trial.)" See also *Wells v. Smith*, 297 S.E.2d 872, 879 (W. Va. 1982) ("a proper consideration in the assessment of [punitive] damages is the annoyance and inconvenience to the plaintiff caused by the defendant's wrongful conduct," citing *Jarrett v. E.L. Harper & Son, Inc.*, 235 S.E.2d 362 (W. Va. 1977)). Many other states also define compensation of the victim for the costs of litigation as one purpose of punitive damages awards.[15]

West Virginia law also considers the extent of the harm inflicted on the plaintiff in determining the appropriate amount of punitive damages. *Garnes*, 413 S.Ed.2d at 908 (punitive damages should bear a reasonable relationship to the harm that has actually occurred); *Wells*, 297 S.E.2d at 878 (in assessing punitive damages trier of fact should consider, *inter alia*, the extent of harm inflicted).[16] Again, many other jurisdictions also look to the extent of the harm inflicted as a central factor in the punitive damages calculation.[17]

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[15] *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985) (under Mississippi law one purpose of punitive damages is rewarding the injured party for bringing suit); *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. Civ. App. 1984) (punitive damages intended to compensate plaintiff for inconvenience and attorney's fees); 30 ALR 3d 1443, 1448-1453; *see also* Restatement (Second) Torts § 908, comment e (1977) (fact that plaintiff has been put to trouble and expense in protecting his interests may be considered in determining amount of punitive damages). *Cf., Berry v. Loiseau*, 614 A.2d 414, 437 (Conn. 1992) (common law punitive damages awards are *limited* to a party's litigation costs).

[16] West Virginia law also considers the harm that is likely to occur from the defendant's conduct. This issue is discussed *infra* in section III.

[17] *See, e.g., Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal.App.3d 1220, 1257, 1 Cal.Rptr.2d 301, 323 (1991) (punitive damages must bear a reasonable relation to the injury, harm or damage actually suffered); *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991) (applying Virginia law and requiring consideration of harm that did result from defendant's conduct). *See*

(continued...)

No procedure on appeal checked whether the jury's award was consistent with the state's purposes for awarding punitive damages or its articulated criteria for determining the amount of an award. The West Virginia Supreme Court considered whether the award was "excessive" by considering the ratio of punitive to compensatory damages, the compensatory damages consisting entirely of attorney's fees. Where compensatory damages consist solely or partly of attorney's fees, consideration of a ratio of punitive to all other damages does not assure that the punitive damages bear a rational relationship to *either* the plaintiff's costs of litigation *or* the extent of harm to the plaintiff. *See Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 967 (Utah Ct. App. 1989) (attorney's fees "go on neither side of the scale when determining whether the amount of punitive damages awarded 'bear[s] a reasonable relation' to the amount of general damages"); *Byler v. Garcia*, 685 S.W.2d 116, 120 (Tex. Ct. App. 1985) (trial court properly did not include attorney's fees award in its consideration of punitive damages).

If a state allows a jury or court to take into account the costs of litigation in awarding punitive damages, it has made a judgment that punitive damages should be higher when the plaintiff has not been compensated for his litigation expenses. If a trial or appellate court, however, calculates a ratio of punitive to compensatory damages for purposes of determining whether the award is excessive and *includes* an attorney's fees award in the denominator of the ratio without any other adjustment, the court has refused to give the defendant the benefit of the criteria the state purports to apply. If a greater amount of punitive damages is justified to reimburse a plaintiff for the costs of litigation, then a lesser award must be permitted when the costs of litigating already have been reimbursed.

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[17] (...continued)
also, Restatement (Second) Torts, § 908(2) (1977) (in assessing punitive damages the trier of fact can properly consider "the nature and extent of the harm to the plaintiff").

Moreover basing a ratio on the amount of attorney's fees incurred by the plaintiff in many cases will lead to absurd results. A defendant has no control over the energy and resources a plaintiff chooses to bring to bear in litigation. If the attorney's fees in this case had been $1 million, the line of reasoning of the court below would have required TXO to pay the $1 million as part of compensatory damages and a punitive damages award of $500 million. This approach becomes even more absurd, when, as is sometimes the case, plaintiff's counsel's fee award already is based on a multiplier.

When a state considers the amount of harm to the plaintiff in determining the appropriate size of a punitive damages award, the state's procedures for trial or appellate review of excessiveness also must take into account whether or not the plaintiff already has been compensated for the "harm" of incurring litigation expense to vindicate his rights. In the hypothetical situation described above, the plaintiffs in cases 1 and 2 suffered the same amount of harm. In case 2, before the award of punitive damages, the plaintiff was compensated for the harm done by the defendant's wrongful acts *and* for the cost of obtaining reimbursement for that harm (the attorney's fees award). The state's procedures for measuring the excessiveness of a punitive damages award may not irrationally measure "harm" to the plaintiff in case 1 without reference to the cost of vindicating rights but measure "harm" in case 2 as *including* the costs of bringing and prosecuting the lawsuit.

Thus, the "excessiveness" calculus engaged in by the West Virginia Supreme Court in this case did not assure adherence to the state's criteria for determining punitive damages. Unlike in *Haslip*, the "standards [do not] have real effect when applied by [the state supreme court] to jury awards." *Haslip*, 111 S.Ct. at 1045. Nor did the West Virginia Supreme Court's excessiveness inquiry ensure that punitive damages "have some understandable relationship to compensatory damages." *Id.* Consideration of an appropriate ratio of punitive to compensatory damages must assure consistency with the criteria chosen by the state for determining the amount of punitive damages. The court below, by contrast, utterly

ignored two of the state's rationales for award of punitive damages -- reimbursement for costs of suit and consideration of harm to the plaintiff -- by failing to recognize that the attorney's fees award itself reduced the need for a punitive damages award.

B. The West Virginia Supreme Court's Treatment Of The Attorney's Fees Award In The Punitive Damages Calculus Was Ad Hoc And Subjective

Just as a state cannot constitutionally deprive a defendant of property without some meaningful criteria for determining the amount of an award, it cannot constitutionally articulate valid criteria but refuse to apply them. Yet this is what was done here. The state of West Virginia appropriately determined that punitive damages should provide compensation to the plaintiff for the costs of the lawsuit. It also determined that punitive damages should be proportional to the harm to the plaintiff. But the West Virginia Supreme Court's purported application of these criteria in fact conflicts with them. As discussed above, the court refused to lower the punitive damages ratio in recognition of the fact that the award of attorney's fees already had served to compensate the plaintiff for costs of litigation and reduced the harmful effects of the defendant's conduct.

The state's imposition of punitive damages thus becomes impermissibly "arbitrary and capricious" and a violation of due process. See *Dent*, 129 U.S. at 124. As this Court stated in *Grayned*:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-109. The West Virginia Supreme Court's application of its state's criteria for calculating punitive damages makes the criteria themselves "*ad hoc* and subjective." Compensation to the victim for his litigation expenses apparently may or may not affect the size of the punitive damages award depending on whether one looks to the general criteria applied by state decisional law prior to this case or the West Virginia Supreme Court's application of those criteria.

This Court has recognized that "concrete problems of constitutional dimension" under the due process clause sometimes may emerge through arbitrary and discriminatory enforcement of state law. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982), *citing Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52 (1966). Such a problem has emerged here. Whatever guidance and predictability West Virginia's criteria for calculating punitive damages may have had in and of themselves, they lost those neutral qualities in the West Virginia Supreme Court's interpretation and application of those criteria in this case. West Virginia's purported test for when a punitive damages award is "excessive" violates the Due Process Clause.

III. THE WEST VIRGINIA SUPREME COURT'S SPECULATIVE CONSIDERATION OF "POTENTIAL HARM" ALSO WAS STANDARDLESS

In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court established a detailed system for addressing awards of punitive damages in compliance with the requirements of due process. 413 S.E.2d at 908. One of the criteria announced by *Garnes* was "that the punitive damages should bear a reasonable relationship to the *harm that is likely to occur from the defendant's conduct* as well as to the harm that actually has occurred." *Id.* at 909. (emphasis added). The court below, however, rather than engaging in a rational and meaningful determination of

whether the actual conduct of the defendant was *likely* to cause future harm, engaged in an arbitrary guessing game as to the potential harm by other conduct (and perhaps by other potential defendants) to other victims. The West Virginia Supreme Court's "objective" and "meaningful" review of the "harm that is likely to occur from the defendant's conduct" consisted of the following off-the-cuff remarks: "The *type* of fraudulent action intentionally undertaken by TXO in this case *could potentially* cause millions of dollars in damages to *other* victims. . . . Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit." Pet. App. 40A (emphasis added).

First, these comments bore absolutely no relationship to proceedings in the trial court in this case. The trial court instructed the jury to consider "the extent of the harm inflicted. . . ." Resp. App. B. This instruction took account only of *actual* harm to the plaintiff by the defendant. It did not ask the jury to consider, as the West Virginia Supreme Court did, other potential instances of the "type" of conduct engaged in by TXO. It did not allow the jury to speculate about "potential[]" harm from conduct that might occur in the future. The justices' conjecture about the actions TXO (or others) might take in the future, and the harm that "could" be caused to other unspecified victims, bore no relationship to any inquiry the jury was called upon to make. When *Haslip* stated that appellate review must provide an additional check on jury and trial court discretion, it could not have intended that the appellate court "check" the trier of fact by itself indulging in speculative inquiries that were not even considered in the trial court. *Haslip*, 111 S. Ct. at 1045.

Moreover the supreme court's "analysis" was not based on facts or evidence. Its statements rely on nothing more than the justices' conjecture. The jury's verdict in fact *contradicts* the West Virginia Supreme Court's conjecture. The appellee recovered $19,000 in compensatory damages on its slander of title claim -- the amount it cost the appellee to defend itself in the quiet title action brought by TXO. Pet. App. 20A. There was no

award suggesting a jury finding that TXO's actions had caused the Respondents any further harm, such as a lost opportunity involving another party. Thus, while the supreme court hypothesizes that the "type" of action engaged in by TXO "could potentially cause millions of dollars in damages to other victims," *id.* at 40A, it provides no insight into what these future actions might be or how they could cause multi-million dollar harm where so little resulted in this case. It is not enough that a state articulate criteria for determining the amount of a punitive damages award; the criteria must be meaningful in application. *See Village of Hoffman Estates*, 455 U.S. at 1196. In contrast with *Haslip*, here the "standards [did not] have real effect when applied. . . ." 111 S.Ct. at 1045.

Indeed the criteria articulated by the court below for determining "potential harm" are inherently standardless and are incapable of anything other than arbitrary and capricious application. *Any* "type" of fraudulent or tortious conduct "could potentially cause millions of dollars in damages to other victims" in some hypothetical circumstance. This inquiry is not confined to situations where tortious conduct already engaged in by the defendant is likely to cause harm to a definable group; as for example, where a car manufacturer has introduced a dangerously defective product into the chain of commerce and the number of purchasers may be ascertained. The "standard" applied by the court below encourages speculation about conduct that has not yet occurred (for example, creation of a new, even more defective product) and about the harm such conduct could cause an undefined number of hypothetical victims (including, perhaps, some number of "eggshell" plaintiffs).

The West Virginia Supreme Court's "potential harm" inquiry may go even further. In measuring potential harm from the "type of fraudulent action" engaged in by TXO, the court may have been considering harm from fraudulent activity by potential defendants *other than* TXO. The notion of punishing TXO because of possible conduct by others offends the most deeply seated concepts of justice. "No man should be punished for that of which he is not

guilty." *Lake Shore & M.S. Ry v. Prentice*, 147 U.S. 101, 115 (1893).

If a state's articulated criteria require an estimate to be made -- for example, an estimate of "potential harm" -- that estimate must be capable of having a sound evidentiary basis. Standards that call for sheer speculation will not do. The West Virginia Supreme Court's consideration of "potential harm" was divorced from the facts and evidence of the case, and encouraged speculation about indeterminate future actors, events, and effects. This inherently "*ad hoc* and subjective" inquiry, *Grayned*, 408 U.S. 109, lacked the "objective criteria" required by *Haslip*, 111 S.Ct. at 1046, and deprived TXO of due process.

CONCLUSION

Amicus curiae respectfully requests that the decision of the West Virginia Supreme Court be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

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Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The Center for Claims Resolution (the "Center") is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[1] The Center was formed in October 1988 to deal with the unprecedented explosion in asbestos-related

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[1] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certain-Teed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Gypsum Company; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastic Company, Inc.; and United States Gypsum Co.

litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to resolve claims for fair value. Thus, to date the Center has resolved—through settlement, dismissal, and, in some cases, trial—approximately 115,000 personal injury claims.

As of the date of this brief, approximately 55,000 cases were pending against the Center's members. Virtually all of these suits include claims for punitive damages. In essence, the punitive damages claims made against each Center member seek to punish it for the same conduct, because each such claim is predicated on allegations that the particular Center member knew of the potential hazards of asbestos but failed to warn of them. Absent some change in the law, the Center expects that almost all future actions against its members will likewise seek punitive damages. Awards of such damages in the past have helped drive other defendants into bankruptcy, thus placing an increasing liability share on remaining defendants. The threat of punitive damages in every case, moreover, greatly inflates the amounts plaintiffs seek in settlement, and makes settlement difficult or impossible in many cases. The Center's nationwide litigation experience thus gives it a perspective on the punitive damages issue that may prove useful to the Court.[2]

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires "fundamental fairness" in our legal proceedings, *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18, 24 (1981). One of the issues in this case is to what extent the Due Process Clause imposes substantive limits on the amount of punitive damages that may be awarded against

[2] Written consents to the filing of this brief from the parties have been filed with the Clerk of the Court.

a litigant in a particular case for a single wrongful course of conduct.

In framing the standards for such an excessiveness inquiry under the Due Process Clause, the Court should take note of the class of cases arising from mass tort litigation, where a single defendant can be held liable for punitive damages over and over again for precisely the same conduct. While the question of how the excessiveness inquiry should take account of multiple punitive damages awards imposed against a defendant for the same conduct is not presented here, we urge the Court to adopt a standard that does not foreclose consideration of prior punitive damages awards in assessing the excessiveness of a particular award.

In the mass tort setting, the constitutionality of any one punitive damages award cannot be judged by examining it in isolation. Excessiveness must instead be determined by reference to *all* the punishment that a defendant has suffered for the conduct in question. Otherwise, a defendant could be subjected to aggregate punishment for the same course of conduct in amounts that are constitutionally excessive, even though no single award might be so large as to be fundamentally unfair.

ARGUMENT

THE DUE PROCESS STANDARD FOR DETERMINING EXCESSIVENESS SHOULD ALLOW FOR CONSIDERATION OF ANY PRIOR PUNITIVE DAMAGES AWARDS IMPOSED ON A DEFENDANT FOR THE SAME CONDUCT

One issue presented in this case is whether the $10 million award of punitive damages against Petitioner TXO Production Corp. is excessive and disproportionate under the Due Process Clause. For the reasons stated in the briefs for Petitioner and supporting *amici*, we believe that the award in this case was excessive and should be set aside.

In considering the standards that should govern whether an award is excessive, however, the Court should bear in mind a situation that is not present in the case at bar, but that has become common and could be affected by the Court's decision in this case. Our concern relates to "the increasingly prevalent mass tort situation . . . [where] a defendant [is exposed] to repetitious punishment for the same culpable conduct." *In re School Asbestos Litig.*, 789 F.2d 996, 1003-04 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). We raise this concern because we expect that it will be urged that an award of punitive damages in a given case is not excessive, so long as that award is reasonably related to the compensatory damages awarded in the case.[3] In that regard, the Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), upheld the award of punitive damages, but did suggest that the greater than 4:1 ratio between the punitive damages and the compensatory damages awarded in that case "may be close to the line" of "constitutional impropriety." *Id.* at 1046 (footnote omitted). In the mass tort setting, an examination of the ratio of punitive damages to compensatory damages in an individual case will not by itself be sufficient to determine excessiveness. This is because the imposition of punitive damages based on a seemingly reasonable relationship to the compensatory damages awarded in any single case could result in punitive judgments that are, in the aggregate of all cases, grossly excessive. Accordingly, we urge the Court to adopt a standard for determining excessiveness that does not foreclose meaningful consideration of prior punitive dam-

[3] Some commentators have suggested that punitive damages awards would be reasonable if they did not exceed a prescribed multiple of compensatory damages. See, *e.g.*, Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1273-74 (1987); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 314-20 (1983).

ages awards imposed for the same conduct in a case where that factor is present.

A. Mass Tort Cases Present Unique Problems

Mass tort litigation is the result of a national market for mass-produced products. Whenever a product distributed to many thousands, or millions, of users is found to have injured some users, the likely result is thousands of products liability suits brought in numerous state and federal forums by other users allegedly also harmed by the product. Typically, each user files a separate claim seeking compensatory and punitive damages against the same defendant. This multiplicity of actions creates a significant potential for multiple awards of punitive damages against a defendant for the same act or course of conduct.[4]

The asbestos products liability litigation is, of course, the leading example of such mass tort litigation. By June 30, 1991, over 71,000 cases had been filed nationwide in the federal courts against various asbestos miners and

[4] See, *e.g.*, *Asbestos Litigation Crisis in Federal and State Courts: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) [hereinafter *Hearing*] (statement of Hon. William W. Schwarzer, at 17); Report of the [U.S.] Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 32-33 (Mar. 1991) [hereinafter Judicial Conference Report]; Dennis N. Jones *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 1-2 (1991); Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (Mar. 3, 1989); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 50 (1982).

product manufacturers.[5] Soon thereafter, the Judicial Panel on Multidistrict Litigation transferred the approximately 26,000 then-pending asbestos actions to the Eastern District of Pennsylvania for coordinated or consolidated pre-trial proceedings.[6] A recent report places the number of claims now pending in the multidistrict proceeding at 35,000.[7] State courts are likewise burdened by the onslaught of asbestos litigation—at least 70,000, and perhaps as many as 129,000, asbestos cases are currently pending in various state courts.[8] New claims continue to be filed nationwide against Center members alone at a rate in excess of 1,500 per month.

The gravamen of all of these claims is that the defendants allegedly knew or should have known of a possible link between asbestos and health hazards, but did not warn users of such dangers. In the context of the asbestos litigation, the aggregate compensatory damages awards would by themselves satisfy any need for punishment and deterrence. Nevertheless, punitive damages totaling millions of dollars have been assessed repeatedly against a number of defendants as punishment for alleged misconduct with respect to asbestos warnings. In the asbestos context, multiple punitive damages awards, imposed decades after the allegedly wrongful conduct, punish officers who did not participate in such conduct and shareholders who did not benefit from it. The size of such aggregate punitive awards,[9] when added to the tens of thousands

[5] *Hearing, supra* note 4 (statement of Hon. William W. Schwarzer, at 36).

[6] *In re Asbestos Prods. Liab. Litig. (No. VI) (MDL No. 875)*, 771 F. Supp. 415 (J.P.M.L. 1991).

[7] Asbestos MDL 875 Update (Andrews) (Nov. 9, 1992) at 4.

[8] State Judges Asbestos Litigation Committee, *Megatorts: The Lessons of Asbestos Litigation*, at 1 (July 21, 1992), *reprinted in* Mealey's Litig. Rep. — Asbestos (Nov. 20, 1992) at B-1.

[9] A brief review of published data shows that, even as early as 1982, the punitive damages awards in asbestos cases had become staggering. A survey published in the Asbestos Litigation Reporter (Andrews) that was included in an appendix to the opinion in *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), showed that, by the end of 1982, in trials of 147 asbestos cases, a total of $39.47 million in punitive damages had been awarded to 21 plaintiffs. *Id.* at 1338 & n.37. Similarly, at the time it filed for Chapter 11 reorganization in 1982, the Manville Corporation reported that ten punitive damages verdicts had been returned against it, averaging $616,000 each, for a total of $6.16 million. *Id.* at 1339 & n.40. In addition, a study by the Rand Corporation in 1984 reported that, in the period from January 1, 1980 through August 26, 1982, 19 plaintiffs received a total of $4.93 million in punitive damages awards. *Id.* at 1338-39. In more recent years, punitive damages awards have grown even higher. For example, in November 1987, six Delaware plainitffs were awarded $75 million in punitive damages against asbestos defendant Raymark Industries, Inc., which shortly thereafter went into bankruptcy. *George* v. *AC&S, Inc.*, No. 82C-MR71 (Del. Super. Ct., New Castle County, Nov. 9, 1987), *reported in* Asbestos Litig. Rep. (Andrews) (Nov. 20, 1987) at 16,100. Further, in 1990, shortly before filing for bankruptcy protection, the Celotex Corporation stated in affidavits that, between September 1988 and March 1989, over $10 million had been awarded against it for punitive claims, compared to $15 million in judgments for compensatory damages during the same period. *Edwards* v. *Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990).

[10] Since the commencement of this litigation in the mid-1970s, at least thirteen asbestos manufacturers have filed for protection under the U.S. bankruptcy laws, including Manville, Raymark Industries, Eagle-Picher, H.K. Porter, Celotex, Carey Canada, Forty-Eight Insulations, Unarco, Nicolet, Amatex, Huxley, Pacor, and Standard Asbestos. In addition, National Gypsum Co. is in Chapter 11 reorganization, although its reorganization was not prompted by its asbestos liabilities.

[11] The Judicial Panel on Multidistrict Litigation transferred 78 actions filed against manufacturers of silicone breast implants to

of large compensatory damages awards, have helped to drive many asbestos producers into bankruptcy.[10]

The asbestos products liability litigation is not unique. Mass tort litigation has arisen with respect to numerous products distributed nationwide. Examples include litigation involving silicone gel breast implants;[11] MER/29,

an anti-cholesterol drug;[12] DES, a prescription drug prescribed to prevent miscarriages;[13] bendectin, a prescription drug used to control morning sickness;[14] the Dalkon Shield intrauterine birth control device;[15] computers, adding machines, supermarket checkout scanners, and other devices whose use is alleged to cause "repetitive stress injury";[16] and a particular car transmission alleged

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the Northern District of Alabama this past June. *In re Silicone Gel Breast Implants Prods. Liab. Litig. (MDL No. 926)*, 793 F. Supp. 1098 (J.P.M.L. 1992). Information presented to the Panel at the time of transfer suggested that more than one million women have received silicone breast implants. *Id.* at 1098. Further, among the parties responding to the motions to transfer were attorneys who represented more than 6,000 actual and potential plaintiffs. *Id.* at 1099.

[12] More than 1,500 suits were filed nationwide against the manufacturer, Richardson-Merrell. *Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 704 & n.828 (1983).

[13] Approximately 1,000 suits were filed against the manufacturers. Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 920 (1989).

[14] More than 1,900 suits have been filed against the manufacturers. *Id.* at 920-21.

[15] Approximately 14,000 cases have been filed against the manufacturer, A.H. Robins. *Id.* at 921. In 1985, when A.H. Robins declared bankruptcy, the company had settled some 9,200 cases for a total of $530 million, had paid or appealed punitive damages awards totaling over $23 million, and still faced over 5,000 claims for compensatory and punitive damages. *In re A.H. Robins Co.*, 89 B.R. 555, 557-58 (E.D. Va. 1988).

[16] Forty-four "repetitive stress injury" cases filed against manufacturers and employers and pending in the Eastern District of New York were recently consolidated. *In re Repetitive Stress Injury Cases*, 142 F.R.D. 584 (E.D.N.Y. 1992). Affidavits filed with the court at the time of consolidation reported that 16 "repetitive stress injury" cases were pending in the Southern District of New York, 84 cases were pending in New York state courts, and many more cases are expected to be filed in the near future. *Id.* at 585.

to slip out of park into reverse.[17] The multiple claims filed with respect to each product generally allege that it was defective in design or that there was a failure to warn, and it appears that most actions sought punitive damages as well as compensatory damages.

Defendants in such cases can be exposed to overwhelming punitive damages liability. This special problem is exacerbated by the recent emergence of the "multiplier" method of assessing punitive damages. *E.g.*, *Cimino* v. *Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990). Under this approach, punitive damages are tried in "common issue," consolidated trials involving hundreds or possibly thousands of claimants, with the jury determining a punitive damages "multiplier" for each defendant. Then, as compensatory damages are assessed as to each individual claimant, the punitive damages awarded to that claimant are calculated by multiplying the defendant's share of the claimant's compensatory award by the punitive damages "multiplier." Thus, for example, the *Cimino* litigation included a consolidated trial of the defendants' liability for punitive damages to some 2,298 plaintiffs. The jury determined that four defendants were liable for punitive damages and should be assessed those damages at multipliers ranging from 1.5 to 3.0 times the compensatory damages award.[18] 751 F. Supp. at 657-58.

The use of such punitive damages multipliers in consolidated cases, such as *Cimino*, can readily lead to awards of punitive damages totaling hundreds of millions of dollars.[19] And *Cimino* is not the only litigation

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[17] Approximately 700 suits were filed against Ford Motor Co., the manufacturer of the transmission. Seltzer, *supra* note 4, at 38 n.5.

[18] None of the defendants assessed punitive damages in *Cimino* is a Center member.

[19] The dust has not yet settled in *Cimino*. Two of the original four defendants (Celotex and Carey-Canada) have filed for bankruptcy and a third (Fibreboard) has settled. See Asbestos Litig. Rep. (Andrews) (Oct. 16, 1992) at 26,227. Only Pittsburgh-Corning remains, and its liability has not yet been upheld on ap-

where such punitive damages multipliers have been awarded in consolidated trials of hundreds or thousands of claims.[20] Few, if any, companies could survive even single-instance awards of punitive damages totaling hun-

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peal. The jury assigned a punitive damages multiplier of 3.0 to Pittsburgh-Corning. 751 F. Supp. at 657-58. If one assumes hypothetically that this company has a 10% share of compensatory damages (751 F. Supp. at 654), and the average compensatory damages award is $500,000 (which is less than the average awarded by the *Cimino* jury in 160 sample cases, see Order of Nov. 12, 1990, *Cimino* v. *Raymark Indus., Inc.*, No. B-86-0456-CA (E.D. Tex.), *reprinted in* Asbestos Litig. Rep. (Andrews) (Nov. 16, 1990) at 22,039-48), then the average punitive damages award against Pittsburgh-Corning would be $150,000 in each case ($500,000 x 10% x 3). Totaled over 2,298 cases, the multiplier thus might lead to an aggregate award of punitive damages of over $344 million.

[20] Of significance here, such proceedings have been held in the West Virginia state courts. The Kanawha County Circuit Court in 1989 held a consolidated trial in which punitive damages against three defendants were awarded to 315 claimants at a rate three times each claimant's compensatory award. *In re Asbestos Cases*, No. 84-C-3321 *et al.* (W. Va. Cir. Ct., Kanawha County, May 26, 1989), *reported in* Asbestos Litig. Rep. (Andrews) (June 2, 1989) at 19,093. Since then, other West Virginia courts have ordered similar consolidated trials in which the jury would be asked to determine punitive damages multipliers. For example, such a consolidation was ordered of 533 claims in *In re Asbestos Cases (Individuals)*, Civil Action Nos.: All Pending Cases (W. Va. Cir. Ct., Monongahelia County, Sept. 13, 1991). These cases settled, however, after the West Virginia Supreme Court of Appeals denied a petition for writ of prohibition filed on behalf of the Center's members.

In an even bigger litigation, a Maryland Circuit Court consolidated over 8,500 cases from across the state and held a "common" issues trial resulting in the award of punitive damages multipliers ranging from 0.35 to 2.5 against several defendants. Order Entering Final Judgments, *Abate* v. *AC&S, Inc.*, No. 89236704 (Md. Cir. Ct., Baltimore City, Dec. 9, 1992) at 10-11, *reprinted in* Asbestos Litig. Rep. (Andrews) (Dec. 18, 1992) at 26,650, 26,655. As discussed in note 22 *infra*, the court in this action, however, has deferred entering the judgments for punitive damages.

dreds of millions of dollars. And these mass-consolidated cases represent a small fraction of the asbestos personal injury cases pending nationwide in which a typical asbestos defendant would be participating. The imposition of punitive damages based on even a seemingly modest multiplier of compensatory damages can thus lead, in the mass tort context, to multiple punitive damages awards against a defendant for the same course of conduct that, in the aggregate, are unquestionably excessive.[21]

B. This Court Should Adopt An Excessiveness Standard That Allows For Consideration Of Multiple Punitive Awards For The Same Conduct

A seemingly reasonable relationship between the amount of punitive damages awarded in a single case and the amount of compensatory damages awarded in that case is thus an inadequate basis for determining lack of excessiveness in the mass tort context. As Judge Friendly noted 26 years ago, in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967), a products liability lawsuit against the maker of the drug MER/29, "[t]he legal difficulties engendered by [hundreds of] claims for punitive damages . . . are staggering . . . [since] [i]f all [claimants] recovered punitive damages in the amount here awarded these would run into tens of millions."

Uncontrolled multiple awards of punitive damages against a single defendant for the same course of conduct offend the requirement of fundamental fairness imposed

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[21] By itself, the multiplier approach raises substantial due process concerns, because, when a multiplier is used, the jury determining the multiplier has no way of ascertaining the size of the ultimate punitive damages award, the impact that award will have on the defendant, or the circumstances of the individual plaintiff. Thus, the multiplier method does not allow for the "rational decisionmaking" and "meaningful individualized assessment of appropriate deterrence and retribution," *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1044, necessary to satisfy due process.

by the Due Process Clause. *E.g.*, *Lassiter* v. *Department of Social Servs.*, 452 U.S. at 24. Punitive damages are not designed to compensate plaintiffs, but instead are imposed to punish the defendant and to deter it and others from similar conduct in the future. *E.g.*, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1045-46; *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). As this Court has recognized, the receipt of punitive damages is therefore a "windfall" to any plaintiff. *E.g.*, *id.* at 267; *IBEW* v. *Foust*, 442 U.S. 42, 50 (1979). In the mass tort setting, punitive damages are also a windfall to the first few plaintiffs who recover them, in contrast with later plaintiffs who might face a bankrupt defendant.[22]

In the mass tort setting, however, there is no mechanism to control the aggregate level of such "windfall" awards of punitive damages in multiple actions. Each

[22] The Director of the Federal Judicial Center, Judge William W. Schwarzer, recently observed that:

> "Punitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries." *Hearing, supra* note 4 (statement of Hon. William W. Schwarzer, at 13).

Similarly, the Judicial Conference Report, *supra* note 4, at 32, stated: "[M]ultiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants." "The danger of asset depletion" led Judge Marshall A. Levin of the Maryland Circuit Court for Baltimore City to defer payment of any punitive damages award until all approximately 8,500 plaintiffs in the Baltimore City asbestos litigation received their compensatory awards. *Abate* v. *AC&S, Inc.*, *supra* note 20. In the Center's view, the potential threat of asset depletion in that litigation was the result of Judge Levin's unwise and unlawful decision to hold a mass trial of 8,500 claims in which punitive damages multipliers were awarded.

jury awards punitive damages for wrongful conduct that affected an entire class of injured parties without knowledge of prior punitive awards imposed to punish the same conduct.[23] The punitive damages award in even one of these actions might well constitute a sufficient punishment and deterrent for the conduct that gave rise to all of them. Considered together, punitive awards in a series of separate actions involving the same conduct result "in windfall awards to individual plaintiffs at the expense of a disproportionately punished defendant."[24] Thus, evaluating each award in isolation will not protect defendants against the unfairness of multiple punitive damages awards.

The lower courts that have considered this issue have recognized the substantial due process concerns associated with unlimited multiple punitive damages awards against a defendant for the same course of conduct.[25] These

[23] It is no answer to suggest that the jury should be instructed on the amounts of prior punitive damages awards. Any such instruction is more likely to prejudice than to protect a defendant. See *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 & n.1, *modified*, 718 F. Supp. 1233 (D.N.J. 1989). See also Jones *et al.*, *supra* note 4, at 29-30 ("if presented to a jury, evidence of prior awards imposed for the same conduct could do the defendant more harm than good").

[24] *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 889 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

[25] See, *e.g.*, *King* v. *Armstrong World Indus., Inc.*, 906 F.2d 1022, 1032-33 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990); *Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d at 1004-05; *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. at 1060-64; *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 282-83 (D.N.J. 1989); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond*

courts have had "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d at 839. As a result, no single test to determine excessiveness and no single remedy for any such excessiveness has emerged from the lower court decisions.

There are a number of possible solutions to avoid "overkill" in mass tort cases, however. One possibility would be a "one-bite" rule; that is, the first punitive award imposed against a defendant for a course of conduct would preclude all future claims for punitive damages for the same conduct.[26] Another possibility would require

Shamrock Chems. Co., 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. at 899. See also *United States Mineral Prods. Co.* v. *Waters*, Nos. 90-1838, 90-2010, 91-282, 1992 WL 353387 (Fla. Dist. Ct. App. Nov. 24, 1992), where a panel of the Florida District Court of Appeals *sua sponte* certified to the Florida Supreme Court the issue of whether multiple punitive damages awards for a single course of conduct are permissible.

[26] See, *e.g.*, *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, which allowed a defendant to strike a punitive damages claim upon proof that punitive damages had previously been imposed for the same conduct on the ground that due process barred the imposition of more than one punitive damages award for the same course of conduct. On reconsideration, the court conditioned its ruling upon a showing that the prior punitive damages award had been made after a complete hearing with an opportunity for similarly situated plaintiffs to participate, and with an instruction to the jury that its award would be the only punitive award for such conduct. 718 F. Supp. at 1235. See also *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 728 ("In theory, . . . when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct.")

By statute, Georgia has attempted to impose in part the one-bite solution. Ga. Code Ann. § 51-12-5.1(e)(1) (Michie Supp. 1992) prohibits multiple recoveries of punitive damages against one defendant in products liability actions in that state. The court in *McBride* v. *General Motors Corp.*, 737 F. Supp. at 1579, however, held that the one-award punitive damages provision violated the Equal Protection and Due Process Clauses of the Georgia and United States Constitutions, because it applied only in products liability cases and not in other tort cases. Of course, even if *McBride* is ultimately overturned, the Georgia statute would still apply only in the courts in that state and would not limit awards elsewhere.

the trial judge to reduce the jury's punitive damages award against a defendant in a particular case by a dollar-for-dollar credit for punitive damages previously awarded against that defendant for the same course of conduct.[27] Other solutions might be possible.[28]

[27] This approach has been codified in Missouri. Missouri provides for a post-trial proceeding in which the defendant may request "the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based." Mo. Rev. Stat. § 510.263(4) (1991). The statute permits the court to offset all prior punitive awards against a defendant for the same conduct regardless of the jurisdiction in which they were imposed.

[28] Judge Schwarzer has stated that an ideal national solution to asbestos litigation problems would "reserve punitive damages until the claims of present and future claimants for compensatory damages have been satisfied." *Hearing*, *supra* note 4 (statement of Hon. William W. Schwarzer, at 7). Consistent with this view, Judge Charles R. Weiner, the multidistrict judge in *In re Asbestos Prods. Liab. Litig.*, *supra* note 6, in ordering the transfer of cases back to their transferor courts, has routinely severed the punitive damages claims in those cases and retained jurisdiction over them. Those orders provide that "the issue of punitive damages must be resolved at a further date . . . ." *E.g.*, Order of May 1, 1992, MDL No. 875 (E.D. Pa.). Actions such as this will aid the courts and the parties in finding solutions to the punitive damages problem and should be encouraged.

Other suggestions are not, however, likely to solve the problem. For instance, it has been proposed that the trial judge, in reviewing the excessiveness of a particular punitive damages award, should consider evidence of prior punitive awards against the defendant for the same conduct, and to reduce or set aside the present award to the extent that it imposes excessive punishment for the same conduct. See *Juzwin* v. *Amtorg Trading Corp.*, 705

The Court need not resolve this question now. We urge the Court, however, to adopt a standard for determining excessiveness in this case that leaves room for consideration of prior punitive damages imposed on a defendant for the same conduct and does not foreclose consideration of whether multiple awards of punitive damages violate due process, so that the lower courts can continue to grapple with this question and this Court can consider it in an appropriate case.[29]

F. Supp. at 1056 n.1. The Alabama post-award review procedure approved by this Court in *Haslip* included consideration of such other awards. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1045. If the post-verdict review for excessiveness that occurred in this case is any guide, however, post-trial review is not likely to be effective.

[29] See *Dunn* v. *HOVIC*, No. 91-3837, 1992 WL 228875 (3d Cir. Sept. 18, 1992), *vacated and reh'g in banc granted*, (3d Cir. Oct. 8, 1992), where a panel of the Third Circuit disagreed about whether the multiple imposition of punitive damages was excessive. The Third Circuit will revisit this issue in its *in banc* proceedings. See also, *e.g.*, *Simpson* v. *Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir.) (insufficient record precludes consideration of due process challenge to multiple awards of punitive damages), *cert. dismissed*, 497 U.S. 1057 (1990); *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1287 (2d Cir.) ("[I]nsufficient proof to demonstrate an unjust result of multiple imposition of punitive damages for the same course of conduct."), *cert. denied*, 111 S. Ct. 297 (1990); *Racich* v. *Celotex Corp.*, 887 F.2d at 398 (substantive due process issue of multiple punitive damages awards not adequately raised nor properly preserved); *Eagle-Picher Indus., Inc.* v. *Balbos*, 604 A.2d 445, 472 (Md. 1992) (no foundation for argument that multiple punitive damages awards violate due process).

CONCLUSION

For the reasons stated in the briefs for Petitioner and supporting *amici*, the judgment of the West Virginia Supreme Court of Appeals should be reversed and the case remanded for further proceedings. For the reasons stated in this brief, any standard for determining whether an individual award of punitive damages is excessive should allow for consideration of prior awards for the same conduct.

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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the West Virginia Supreme Court of Appeals

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BRIEF OF *AMICI CURIAE* OWENS-ILLINOIS, INC. AND TEXACO INC. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* OWENS-ILLINOIS, INC. AND TEXACO INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*

Owens-Illinois, Inc. ("Owens-Illinois") and Texaco Inc. ("Texaco") respectfully submit this brief as *amici curiae* in support of Petitioner with the consent of the parties. The letters of consent from counsel for Petitioner and Respondents have been filed with the Clerk of the Court.

Amici Owens-Illinois and Texaco take the position that the procedural due process analysis employed by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), was correct and should be applied in the instant case to reverse the judgment below.

The specific interests of Owens-Illinois and Texaco in the instant case are as follows:

Owens-Illinois

Owens-Illinois has a significant interest here because it is one of the defendants in the asbestos-related personal injury litigation. Owens-Illinois is, and always has been, primarily a manufacturer of glass bottles and jars. Its involvement in the asbestos-related personal injury litigation stems from a single type of insulation material known by the name "Kaylo," which contained approximately 15% asbestos. Owens-Illinois first manufactured Kaylo in commercial quantities in the late 1940's, and it ceased all manufacture of this product in April 1958—longer than three decades ago.

Today, because of this single product that it ceased making 35 years ago, Owens-Illinois is one of the defendants in tens of thousands of asbestos-related personal injury cases across the country. The large majority of these cases include claims for punitive damages. The Judicial Panel on Multidistrict Litigation has transferred the approximately 30,000 asbestos-related personal injury cases pending in federal court to Judge Charles Weiner of the U.S. District Court for the Eastern District of Pennsylvania. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). In those cases Judge Weiner has remanded for trial, or suggested to the Judicial Panel that it remand for trial, Judge Weiner has severed and retained in his court the claims for punitive damages for the reason that "the issue of punitive damages must be resolved at a further date with regard to the entire MDL." *E.g.*, Suggestion of Remand, MDL-875 (E.D. Pa. Apr. 29, 1992); Transfer Order, MDL-875 (E.D. Pa. June 3, 1992).

Since Judge Weiner recognizes the necessity for a uniform, nationwide resolution of the issue of punitive damages in the multidistrict litigation pending before

him, this Court's decision in the instant case will have an important bearing on the disposition of those claims.

The Judicial Panel lacks statutory authority to transfer cases pending in state courts. Thus, while Judge Weiner has coordinated his efforts to promote settlement with many state judges, the transfer of the federal cases has not directly affected the tens of thousands of asbestos-related personal injury cases in state courts across the country. (Owens-Illinois is a defendant in many of the state cases.) In contrast to the uniform approach adopted by Judge Weiner, the state courts in asbestos-related personal injury litigation have failed to apply *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), in any consistent way. Indeed, Owens-Illinois is now seeking a writ of certiorari from this Court to review a judgment by the Texas state courts awarding $1.2 million in punitive damages against Owens-Illinois. *Owens-Illinois, Inc. v. Pool*, 813 S.W.2d 658, 687 (Tex. Ct. App. 1991) (affirming punitive damages on ground that amount does not "shock the sense of mankind"), *writ of error dismissed*, No. D-1376 (Tex. Nov. 11, 1992), *cert. petition filed*, 61 U.S.L.W. —— (U.S. Jan. 22, 1993) (No. ——). (The first question presented in Owens-Illinois' petition for certiorari in *Pool* is identical to the procedural due process question in the instant case.)

The most unfair feature of the pending claims for punitive damages against Owens-Illinois is that it has already *paid* millions of dollars in multiple judgments for punitive damages arising out of a single, decades-old course of conduct. *E.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1283 (2d Cir.) (affirming punitive damages against Owens-Illinois in two cases in the total amount of $1.8 million), *cert. denied*, 111 S. Ct. 297 (1990); *Roby v. Owens-Illinois, Inc.*, No. 91-3081, slip op. (6th Cir. June 8, 1992) (affirming award by one jury of $250,000 in punitive damages against Owens-Illinois, while second jury, after hearing same evidence,

refused to award punitive damages), *cert. denied*, 113 S. Ct. 411 (1992); *Bolyard v. Owens-Illinois, Inc.*, No. 913029, slip op. (W. Va. May 13, 1992) (declining to review $30,000 award of punitive damages against Owens-Illinois, where second jury, after hearing the same evidence, refused to award punitive damages), *cert. denied*, 113 S. Ct. 462 (1992). *Cf. Eagle-Picher Indus. v. Balbos*, 578 A.2d 228, 260 (Ct. Spec. App. Md. 1990) (concluding that evidence did not support award of punitive damages against Owens-Illinois), *aff'd in part and rev'd in part on other grounds*, 604 A.2d 445 (Md. 1992).

Texaco

Texaco also has a substantial interest in the Court's decision in the instant case. Texaco has seen in recent years two extremely disturbing developments: one, a tremendous explosion in punitive damages awards, and two, an erosion in the standard applied by courts for the award of punitive damages, both in charges to the jury and in appellate review. Texaco's recent empirical study, *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992), has received wide discussion in legal symposia, publications, and in several briefs (including the *amicus* brief of the American Petroleum Institute and National Association of Manufacturers in support of the petition for certiorari in the instant case).[1] This study shows, on the most conservative basis possible, that punitive damages awards *affirmed* by appellate state and federal courts in four important and geographically diverse states have increased more than 117 times (after adjusting for inflation) between the time periods 1968-71 and 1988-91. *Id.* at 2-4. Since this trend represents *final* appellate dispositions, it reflects only the tip of the iceberg of punitive damages assessed against American businesses.

[1] In connection with that *amicus* brief, copies of the presentation of Texaco's empirical study of punitive damages were served on counsel for Petitioner and Respondents and lodged with the Clerk.

Punitive damages also have become untethered from the concept of maliciousness. *See generally, Smith v. Wade*, 461 U.S. 30, 57-88 (1983) (Rehnquist, J., dissenting). The most cogent proof to Texaco of this (besides the proliferation of requests for punitive damages in cases posing neutral conduct), was the case of *Mason v. Texaco Inc.* where a jury found Texaco liable for compensatory damages of $3 million (and other defendants for $6 million), and explicitly found that Texaco's conduct did not warrant an award of punitive damages. *See Mason v. Texaco Inc.*, 862 F.2d 242 (10th Cir. 1988) (reversing award of compensatory damages and remanding for new trial). On remand, a second jury found Texaco liable for the full $9 million in actual damages, and added a $25 million punitive damages award to the verdict. *See Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) (affirming punitive damages award with a remittitur to $12,500,000), *cert. denied*, 112 S. Ct. 1941 (1992).

SUMMARY OF ARGUMENT

This Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), adopted an analytically correct approach to the procedural due process implications of punitive damages. This case presents an opportunity to sharpen the *Haslip* analysis and clarify the due process principles governing punitive damages.

In *Haslip*, the Court identified the competing interests of the parties by noting the defendant's "interest in rational decisionmaking," and the State's interest in "meaningful individualized assessment of appropriate deterrence and retribution." *Id.* at 1044. The *amici* submit that this framework of competing interests should remain the focus of this Court's review of *TXO Production*.

Amici are of the view that the Court in *Haslip* did not intend to embed Alabama law into due process jurisprudence. Rather, the Court appears to have identified Alabama as one model of an adequate adjustment of the competing interests in this field. The Due Process Clause does not require a specific method of adjusting these interests, but it *does* require that they be adjusted on a rational basis.

Amici submit that in *TXO Production* the Court should identify three aspects of *Haslip* as presumptively required by procedural due process:

> *First*, the trial court should "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Haslip*, 111 S. Ct. at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). This requirement contemplates a post-verdict hearing in the trial court.
>
> *Second*, evidence of the defendant's wealth should be excluded from the jury so that "plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.
>
> *Finally*, in considering whether a verdict awarding punitive damages is excessive, "the existence of other civil awards against the defendant for the same conduct" must be taken into account "in mitigation." *Id.*

Where a state elects not to provide one or more of these procedural safeguards, the burden would be on the plaintiff to establish that the alternative procedures adopted by that State were equally effective in protecting the defendant's interest in rational decisionmaking.

ARGUMENT

I. THE COURT'S PROCEDURAL DUE PROCESS ANALYSIS IN *HASLIP* WAS CORRECT, AND SHOULD BE APPLIED IN *TXO PRODUCTION*

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court determined that the Alabama process for awarding punitive damages appropriately balances both the defendant's interest in rational decisionmaking and the State's interest in punishing and deterring wrongful conduct. *Id.* at 1044. Petitioner's challenge to the award of punitive damages in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992), can be resolved by the same analysis but with the opposite result: because the process provided by West Virginia completely failed in the instant case to balance the competing interests of the Defendant and the State, the judgment for punitive damages against Petitioner violates due process.

The Court's analysis in *Haslip* focused primarily on the procedures required by Alabama law in the post-verdict review of a jury's award of punitive damages. The purpose of that review, the Court reasoned, was to ensure that the amount of the punitive damages should not exceed that required to accomplish the goals of deterrence and retribution. *Haslip*, 111 S. Ct. at 1045. In this context, the Court's core holding appears to have been that due process is satisfied where state law gives appropriate recognition to the defendant's interest in rational decisionmaking in the judicial review of punitive damages verdicts.

A defendant's interest in rational decisionmaking is heightened in the punitive damages context because most juries receive vague instructions on the substantive standard of conduct that trigger an award of punitive damages. (The jury instructions in *Haslip* did not present

this due process issue because *Haslip* was a case of intentional fraud. *Haslip*, 111 S. Ct. at 1037 n.1.) The problem is most apparent in cases where different juries reach inconsistent verdicts on whether a set of facts warrants punitive damages. For example, in *Mason v. Texaco Inc.*, 948 F.2d 1546, 1559 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), two separate juries heard the same evidence concerning the defendant's conduct: one declined to award any punitive damages, but the other awarded $25 million in punitive damages. Juries reach inconsistent results when deliberating on punitive damages in part because the substantive standards of conduct are vague. *See Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting) (noting that "a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudices of juries").

This may not suggest that the substantive standard of conduct for punitive damages should be a matter of federal constitutional law. *Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring) (noting the "features of the jury system for assessing punitive damages," including the jury instructions, "discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity"). But it does show why, in the context of punitive damages, defendants have an important interest in rational decisionmaking: there are many opportunities for erroneous verdicts awarding punitive damages. *See Haslip*, 111 S. Ct. at 1043 (noting concern with punitive damages that "run wild"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[J]uries assess punitive damages *in wholly unpredictable amounts* bearing no necessary relation to the actual harm caused.) (emphasis added). Just as important, vague standards make it difficult in many courtrooms to keep the question of punitive damages from the jury by way of a directed verdict.

The Court's approval of Alabama's procedures in *Haslip* suggests a flexible rather than rigid approach to

the protections required by due process. Indeed, the Court observed that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," but concluded that "general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus." *Haslip*, 111 S. Ct. at 1043. The Court noted with approval that some states, unlike Alabama, impose a "clear and convincing evidence" or "beyond a reasonable doubt" burden of proof on plaintiffs seeking punitive damages. *Id.* at 1046 n.11. The Court concluded, however, that the weaker Alabama standard was constitutionally sufficient, "buttressed, as it is, by the procedural and substantive protections . . ." required by Alabama law. *Id.*

Thus, *Haslip* teaches that so long as a State gives meaningful protection to the defendant's legitimate interest in rational decisionmaking, whether by adopting an Alabama-like system, or by some other but equally effective means, procedural due process is satisfied.

The West Virginia courts failed to provide *any* of the *Haslip* procedural protections in this case. Instead, the court below adopted a new substantive standard phrased in colloquial terms: awards against "really stupid" defendants could not exceed actual damages by "*roughly* five to one," while awards against "really mean" defendants were subject to no limits. *TXO Prod.*, 419 S.E.2d at 889 (emphasis in original). The amount of punitive damages assessed against Petitioner demonstrates that this substantive test failed to balance rational decisionmaking with appropriate punishment, and therefore did not provide an adequate substitute for the procedural protections approved by this Court's decision in *Haslip*.

The "test" announced by the West Virginia court in *TXO Production* is particularly surprising in light of that court's decision in *Garnes v. Fleming Landfill, Inc.*,

413 S.E.2d 897, 907 (W. Va. 1991). In that case, the West Virginia court correctly recognized that the decision in *Haslip* offers "guidelines" rather than "clear, bright-line rules." The court determined that West Virginia law did not provide the necessary safeguards against excessive awards, and accordingly fashioned procedural protections comparable to those approved in *Haslip*. The court announced that trial and appellate courts must review awards of punitive damages in West Virginia by application of the detailed and substantive standards applied in Alabama. *Id.* at 909-10 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989)). The court further determined that instructions to the jury must explain several of these factors as relevant to the amount of punitive damages awarded, a protection not provided by Alabama law. *Compare id.* at 909 (instructions should advise jury to consider, *inter alia*, whether defendant was aware of harm caused by conduct, any efforts to conceal actions, similar past conduct and the profitability of the wrongful conduct) *with Haslip*, 111 S. Ct. at 1044 (approving jury instruction that explained purpose and nature of punitive damages and fact that imposition not compulsory).

The judgment below, therefore, is plainly inconsistent not only with *Haslip*, but also with *Garnes*. *Haslip* affords the States wide flexibility in choosing the procedural means of satisfying due process. The difficulty is in determining what procedural protections against irrational punitive damages are required by due process as a baseline minimum. A number of courts have stumbled here, and the result has been a substantial divergence in the application of *Haslip*. *Compare Mason v. Texaco Inc.*, 948 F.2d 1546, 1560 (10th Cir. 1991) ($25,000,000 punitive damages award reviewed only by application of a "shock the conscience" measure for excessiveness), *cert. denied*, 112 S. Ct. 1941 (1992) *and Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991) (court concludes that punitive damages award 500

times greater than actual damages "reasonable" without applying *Haslip* substantive standards) *with Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991) ($8,000,000 award of punitive damages reversed and remanded with directions to review the award under the criteria approved in *Haslip) and American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991) (district court's summary denial of post-trial motions did not meet *Haslip* due process standards in case involving $750,000 punitive damages award).

There are three components of the *Haslip* procedures that should be deemed essential: a post-trial hearing on the record; the exclusion from the jury of evidence concerning the defendant's wealth; and the consideration of prior awards against the defendant in reviewing the amount of any punitive damages. These essential components—if identified by this Court in *TXO Production* as presumptively required by due process—will protect against excessive awards of punitive damages while serving the State's legitimate goals of punishing and deterring wrongful conduct. Where a State chooses to vary these procedures, the burden should then shift to the plaintiff to show that the State gave the defendant equally effective safeguards.

II. THREE ESSENTIAL COMPONENTS OF THE ALABAMA PROCEDURE APPROVED IN *HASLIP* SHOULD BE PRESUMPTIVELY REQUIRED BY DUE PROCESS

A. A Post-Trial Hearing on the Record Should Be Required by Due Process

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court noted with approval the requirement that trial courts, in reviewing awards of punitive damages, "are 'to reflect in the record the rea-

sons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.'" *Id.* at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). This Court approved the award in *Haslip* in part because this post-verdict process ensures "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Haslip*, 111 S. Ct. at 1044. Indeed, the Court suggested that less rigorous review standards in other states which require only consideration of the trial record to determine if the jury's verdict is "grossly excessive" or the result of "passion, bias and prejudice," do not satisfy due process. *Id.* at 1045 n.10; *accord Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (trial court review of award of punitive damages that considered only whether award resulted from "passion, prejudice or corruption in the jury" insufficient under due process standards announced in *Haslip*).

The detailed and substantive review in the trial court approved by *Haslip* plainly requires a hearing on the record. The criteria applied in reviewing the award necessarily require the court to look beyond the evidence elicited at trial: for example, while evidence of the defendant's wealth is excluded from trial in accordance with Alabama law, the trial court considers the excessiveness of the award by weighing the "financial position" of the defendant. *Haslip*, 111 S. Ct. at 1045. The trial court also must receive evidence of other factors not heard by the jury, such as the existence of other civil awards against defendant for the same conduct. *Id.* at 1044.

The Fourth Circuit *en banc* has recognized the "almost de novo" nature of this post-trial review process:

> [T]he *almost de novo post-verdict* and appellate reviews conducted by Alabama's trial courts and the Supreme Court of Alabama provided "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages"

> to satisfy due process. . . . [T]he trial courts and the Supreme Court of Alabama review facts, *take new evidence, find additional facts, and actually adjust jury awards of punitive damages.*

Johnson v. Hugo's Skateway, 974 F.2d 1408, 1414 (4th Cir. 1992) (*en banc*) (citation omitted) (emphasis added). Indeed, in *Garnes* the West Virginia Supreme Court of Appeals recognized that "all of the information [relevant to the *Haslip* review factors] is not available to the jury," and must be considered instead by the trial court when measuring the award for excessiveness against these factors. *Garnes*, 413 S.E.2d at 909 (W. Va. 1991).

The post-verdict review of punitive damages awards conducted by the Alabama trial courts, together with careful appellate review, supplies the "definite and meaningful constraint on the discretion of [the] fact finders" required by due process. *Haslip*, 111 S. Ct. at 1045. The review is meaningful because it rests on specific criteria, uses evidence both from the trial and from the post-trial hearing, and finally requires an explicit assessment of the award *on the record*. *See id.* at 1044-45. For these reasons, *amici* submit that a post-verdict hearing on the record should be a presumptive requirement in all cases where punitive damages are awarded.

B. Due Process Prohibits Jury Consideration of the Defendant's Wealth

The jury in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 113 S. Ct. 594 (1992), considered evidence of Petitioner's financial condition in arriving at its $10 million award of punitive damages, and the submission of this evidence was approved by the West Virginia Supreme Court of Appeals. In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1043-44 (1991), this Court emphasized that the Alabama rule excluding net worth evidence at

trial was an important part of the "constitutional calculus." The Court reasoned that in punitive damages cases "the fact finder must be guided by more than the defendant's net worth," and noted that plaintiffs should not "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045. Because excluding evidence of the defendant's wealth from the jury is necessary for rational decisionmaking, this component of *Haslip* should be presumptively required by procedural due process.

Evidence of the defendant's financial condition encourages the jury to fix an amount of punitive damages reflecting the defendant's *status* rather than the defendant's *conduct*. Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages And The Rule Of Law: The Role Of Defendant's Wealth*, 18 J. Legal Studies 415, 423 (1989) ("[P]unishment based on the characteristics of the actor invites erratic and random responses to concerns that have nothing to do with specific misconduct."); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (noting that evidence of wealth of a municipality in the form of its taxing power "may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award" of punitive damages). *Haslip* emphasizes that the fact finder must focus solely on *objective* factors in order to ensure that punitive damages awards are rational and bear a reasonable relationship to the amount of compensatory damages awarded. *See Haslip*, 111 S. Ct. at 1045 (the Alabama procedures "ensure that punitive damages are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"). The introduction of wealth evidence defeats this focus by inviting the jury to consider *not* the nature of the offense and the harm caused, but rather the defendant's "deep pocket."

A recent Reporters' Study for the American Law Institute concluded that evidence of the defendant's wealth

improperly induces juries to consider defendant's status rather than the conduct at issue. 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 254 (1991). The Reporters reasoned that "what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question," and accordingly the Reporters recommended that evidence of the defendant's wealth not be admissible in punitive damages cases. *Id.* at 254-55 (emphasis in original).

The Reporters' Study conclusion is consistent with the procedure provided by Alabama law and approved by this Court in *Haslip*. 111 S. Ct. at 1044-45 (evidence of net worth excluded at trial but trial and appellate courts consider "the profitability to the defendant of the wrongful conduct" in reviewing award of punitive damages for excessiveness). The focus on profitability suggested by the Reporters' Study also appropriately fixes attention on the relevant time period—the time of the wrongful conduct—and not the *current* status of defendant as reflected by net worth evidence. *See Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) (jury considered evidence of defendant's *current* financial condition and awarded $25 million in punitive damages for actions taken more than a decade earlier), *cert. denied*, 112 S. Ct. 1941 (1992).

Although the West Virginia Supreme Court of Appeals, in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), mistakenly found that "[t]he financial position of the defendant is relevant" to the jury's consideration of punitive damages, *id.* at 909,[2] it nonetheless

[2] In a case on remand from this Court for further consideration in light of *Haslip*, Judge Peterson of the California Court of Appeal has written a significant and interesting concurring opinion that focuses on the supposed common law basis for admitting evidence of the defendant's wealth. *AMCA Int'l Fin. Co. v. Hilgedick*, 111 S. Ct. 2253 (1991) (granting cert. and remanding), *on remand sub*

recognized that other, similar facts should be *withheld* from the jury:

> [W]e would not have the subject of insurance raised before the jury, nor would we have any explicit argument about settlement offers . . . . However, these are fit subjects to instruct the trial judge's understanding of the appropriateness of a particular punitive award at the post-trial review stage . . . .

Id. at 910. Similarly, courts consistently exclude from jury consideration evidence of the net economic effect on the parties of verdicts awarding money damages. *See, e.g., Hansen v. Johns-Manville Sales Prods. Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984) (jury not instructed regarding tax consequences of an award of actual damages since to do so would "introduce[] a collateral matter into the damages issue"), *cert. denied*, 470 U.S. 1051 (1985); *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974) (jury in antitrust case not informed that any damages award trebled by operation of law), *cert. denied*, 420 U.S. 992 (1975); *Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3d Cir. 1965) (evidence of defendant's liability insurance not admissible because it would lead to "extravagant verdicts"). The same rule of exclusion is equally appropriate in the case of the defendant's wealth.

An important component of the defendant's interest in rational decisionmaking is the right to be judged on its conduct, not on its status. This Court suggested in *Haslip* that exclusion of evidence of defendant's net worth properly confines jury discretion to "the character and the

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nom., Hilgedick v. Kaehring Fin. Corp., 8 Cal. Rptr. 2d 76, 100-03 (Ct. App.) (Peterson, J., concurring), *review granted*, 832 P.2d 899 (Cal. 1992). Judge Peterson would have held that evidence of the defendant's wealth should be confined to post-trial consideration by the trial and appellate courts. His careful review of the "strange history" of the admissibility of such evidence led him to conclude that this doctrine has a weak footing in precedent.

degree of the wrong . . . and the necessity of preventing similar wrong." *Haslip*, 111 S. Ct. at 1044. *TXO Production* provides an opportunity to clarify this aspect of the Court's decision in *Haslip*, and require that the fact finder arrive at an award of punitive damages without considering evidence of defendant's financial condition.

C. Procedural Due Process Requires Explicit Consideration of Previous Punitive Damages Awards Against the Defendant for the Same Course of Conduct

The inquiry into the excessiveness of a single punitive damages verdict is complicated when that verdict is merely one of several arising out of the same course of conduct by the defendant. The State, by permitting juries to award punitive damages, is seeking to punish the defendant for that unitary course of conduct, and to deter others from similar conduct. The excessiveness of any one award cannot be considered in a vacuum. Instead, to protect the defendant's interest in rational decisionmaking, the courts must measure whether the awards taken *together* are excessive.

This Court recognized due process limits to multiple punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991), by approving consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation" upon review of the punitive damages award. This factor has special significance for due process because it directly implicates both the State's interest in deterrence and retribution, and the defendant's interest in rational decisionmaking: in the absence of a mechanism for considering previous awards, there is no way to determine whether the award at issue is excessive with respect to "appropriate deterrence and retribution." *Id.* at 1044. *See Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple

imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle.").

Haslip involved the assessment of a single award of punitive damages, and discussion of "excessiveness" therefore turned to the ratio of punitive to actual damages: this Court approved an award that was approximately four times the amount of compensatory damages awarded, but noted that the ratio "may be close to the line." *Haslip*, 111 S. Ct. at 1046. In the case at hand, Petitioner urges that the ratio of 526:1 is presumptively excessive.

The discussion of ratios notwithstanding, this Court announced in *Haslip* that an award of punitive damages may not exceed the amount necessary to achieve "appropriate deterrence and retribution." *Id.* at 1044. Under this test, the ratio of punitive to actual damages created by a single award cannot be the sole measure of excessiveness: no matter the ratio, the award may be excessive if a defendant already has paid several awards of punitive damages for the same course of conduct. For example, in *TXO Production*, evidence admitted at trial suggests that Petitioner's course of conduct with respect to oil and gas rights has subjected it to potential liability for punitive damages awards to parties other than Respondents. *See TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 881-86 (W. Va.) (trial court properly admitted testimony of lawyers regarding litigation against TXO Production over payment of royalties and obtaining drilling rights), *cert. granted*, 113 S. Ct. 594 (1992). The $10 million award assessed in this case may be excessive because it is grossly disproportionate to the actual damages award, but it also is excessive if Petitioner has paid other punitive damages awards for the same course of conduct. Petitioner's interest in a rational decisionmaking process therefore demands that review of an award of punitive damages invokes consideration of other punitive damages awards for the same course of conduct.

Multiple awards of punitive damages undermine the public policy objectives underlying punitive damages assessments. The constitutionally permissible purposes that justify the awarding of punitive damages—punishment and deterrence—focus upon the defendant's conduct, not the compensation to an individual plaintiff. *See City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish . . . and to deter . . . ."). Punitive damages awarded to a fully compensated plaintiff are a windfall, but are based on putative public policy objectives. If those objectives already have been achieved in cases arising out of the same course of conduct, then no legitimate governmental objective remains that would allow funds of a defendant to be transferred to a plaintiff.

In considering whether a punitive damages award is reasonably related to the goals of deterrence and retribution, it is important to consider the effect of multiple punitive damages for the same course of conduct. In the words of Judge Henry Friendly:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the greatest difficulty in perceiving how claims for punitive damages in such *a multiplicity of actions throughout the nation can be so administered as to avoid overkill.*

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (emphasis added). Only by requiring courts to consider in the review of each punitive damages award all other awards generated by that course of conduct will "overkill" be avoided, and the goals of rational decisionmaking and appropriate retribution and deterrence satisfied.

In *TXO Production*, this Court should clarify that procedural due process requires a state, in the post-trial review of a punitive damages verdict for excessiveness, to give explicit consideration to the existence of other awards against the defendant for the same course of conduct. *Haslip*, 111 S. Ct. at 1045.

CONCLUSION

The judgment below with respect to punitive damages should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES, CHEMICAL MANUFACTURERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-479

TXO PRODUCTION CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES, CHEMICAL MANUFACTURERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Amici, the American Automobile Manufacturers Association, American Insurance Association, American Petroleum Institute, Business Roundtable, Chamber of Commerce of the United States, Chemical Manufacturers Association, and National Association of Manufacturers,

with the consent of the parties, present this brief in support of the Petitioner.[1]

The American Automobile Manufacturers Association is a trade association of American-owned and controlled companies making and selling multiple lines, makes and models of passenger cars and light trucks. The Association's members, Chrysler Corporation, Ford Motor Company, and General Motors Corporation, manufacture about eighty percent of the motor vehicles produced in the United States.

The American Insurance Association ("AIA") is a national trade organization representing over 250 companies writing property and casualty insurance in every state and jurisdiction of the United States. These companies together write more than $60 billion in premiums annually, representing twenty-seven percent of all property and casualty insurance underwritten in the United States. Combined, AIA companies have assets of $162 billion, and are affiliated with 79,000 independent insurance agents nationwide.

The American Petroleum Institute represents the interests of approximately 300 member companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, and marketing of petroleum products.

The Business Roundtable is an association of the chief executive officers of approximately 200 of the nation's largest companies. The Roundtable examines public issues that affect the economy and develops positions which seek to reflect sound economic and social policies.

The Chamber of Commerce of the United States is America's largest federation of businesses and business organizations, representing more than 215,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce.

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[1] Letters of consent have been filed with the Clerk of the Court.

The Chemical Manufacturers Association is a non-profit trade association whose member companies produce, market, and use industrial chemicals. Its member companies comprise more than ninety percent of the productive capacity for basic industrial chemicals in the United States.

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association representing more than 12,000 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of the nation's manufactured goods. More than 128,000 additional businesses are affiliated with NAM through the NAM Associations Council and the National Industrial Council.

This case is of interest to the *amici* because its disturbingly typifies the disproportionate punitive damages awards that occur under the current unguided and unrestrained patchwork system of awarding punitive damages—a system "run wild" which permits punitive damages awards of the type that "jar one's constitutional sensibilities." *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991). *Amici* are the principal voices of the business and manufacturing communities and their members are the primary victims of excessive punitive damages awards. Ultimately, the impact of these runaway awards is felt by the consumer who purchases goods and services. The *amici* have a unique understanding of the impact of excessive punitive damages awards and the need for clarification of *Haslip's* holding that the Due Process Clause limits jury and judicial discretion in the awarding of punitive damages.

STATEMENT OF THE CASE

This case arises from a declaratory judgment action brought by Petitioner TXO Production Corporation in the

Circuit Court of McDowell County, West Virginia to clear a purported cloud on title on a mineral severance deed. Respondents counterclaimed alleging that TXO's actions constituted the "business tort" of slander of title. The jury found for Respondents and awarded $19,000 as compensation for attorneys' fees incurred in defending against TXO's claim. The jury also awarded Respondents $10 million in punitive damages.

The Supreme Court of Appeals of West Virginia rejected Petitioner's argument that the punitive damages award procedurally and substantively violated the Due Process Clause of the Fourteenth Amendment as enunciated in *Haslip* and *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), and affirmed. *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992). This Court granted certiorari on November 30, 1992.

SUMMARY OF ARGUMENT

As the Court enunciated in *Haslip*, the Due Process Clause places substantive limits on punitive damages awards. The excessive punitive damages award in the instant case "surely crosse[d] that line." *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 596 A.2d 687, 711 (Md. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992). To provide guidance to state legislatures and lower courts about excessiveness and to assure that awards (such as the one in the instant case) which "jar one's constitutional sensibilities" do not continue to "run wild" (*Haslip*, 111 S. Ct. at 1043), the Court should enunciate general guidelines which can be applied in future cases.

ARGUMENT

I. THE DUE PROCESS CLAUSE REQUIRES SUBSTANTIVE GUIDELINES ON PUNITIVE DAMAGES.

A. *Pacific Mutual Life Insurance Company v. Haslip* Has Produced Mixed Results in the Lower Courts.

In *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032, 1043 (1991), the Court made clear that the Due Process Clause of the Fourteenth Amendment places restraints on the award of punitive damages. Punitive damages are not normal civil or tort law damages. Their purpose is not to compensate for injury, but "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'" *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (opinion of O'Connor, J., concurring in part and dissenting in part) (quoting *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988)).[2] They are a "windfall recovery" for plaintiffs. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-271 (1981) (opinion of Brennan, J., dissenting).[3]

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[2] *See also* W. Prosser, J. Wade & V. Schwartz, *Cases and Materials on Torts* 582-29 (8th ed. 1988) (punitive damages "are awarded . . . for the purpose of punishing the defendant, of admonishing him not to do it again, and of deterring others from following his example"); *Day v. Woodworth*, 54 U.S. 363, 371 (1852) ("By the common as well as statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured").

[3] Punitive damages, like many forms of punishment, are by their nature designed to "engender adverse social consequeences" (*Addington v. Texas*, 441 U.S. 418, 425-26 (1979)), including, in many instances, debilitating stigma. Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on the character, reputation, business and good will of the civil defendant. *Browning-Ferris*, 492 U.S. at 281 (Brennan and Marshall, J.J., concurring). *See also International Bd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979) ("the impact of [a puni-

In *Haslip*, a diversity case involving alleged insurance fraud, the Court upheld Mrs. Haslip's punitive damages award, noting that Pacific Mutual knew its agent had engaged in an *identical* "pattern of fraud" at previous times. 111 S. Ct. at 1041. The Court added: "The trial court specifically found the conduct in question 'evidenced intentional, malicious, gross, or oppressive fraud.'" 111 S. Ct. at 1046. Nevertheless, the Court emphasized "once again" its concern about punitive damages that "run wild," and indicated that due process places limits on punitive damages awards. 111 S. Ct. at 1043.[4] The Court declined to express those limitations with precision, but suggested that the punitive damages award in *Haslip*, four times greater than Mrs. Haslip's compensatory damages, was "close to the line" of constitutional impropriety. 111 S. Ct. at 1046.[5]

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tive damages award] is unpredictable and potentially substantial"); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408, 417 (1967) (punitive awards have "'momentous and serious' . . . consequences" for civil defendants) (citation omitted).

[4] *See also Browning-Ferris*, 492 U.S. at 280-81, 282 (Brennan, and Marshall, J.J., concurring) (O'Connor and Stevens, J.J., concurring in part and dissenting in part); *Bankers Life & Cas. Co.*, 486 U.S. at 87 (O'Connor and Scalia, J.J., concurring in part and concurring in the judgment); *City of Newport*, 453 U.S. at 270-71 (Brennan, Marshall, and Stevens, J.J., dissenting).

[5] In the short period since the March 4, 1991 *Haslip* decision, the Court has demonstrated its concern about excessive punitive damages awards many times, vacating and remanding 12 punitive damages cases "in light of *Haslip*." *See Fleming Landfill, Inc. v. Garnes*, 111 S. Ct. 2882 (1991); *Transamerica Occidental Life Ins. Co. v. Koire*, 111 S. Ct. 2253 (1991); *Southern Life & Health Ins. Co. v. Turner*, 111 S. Ct. 1678 (1991); *Intercontinental Life Ins. Co. v. Lindblom*, 111 S. Ct. 1575 (1991); *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 111 S. Ct. 1298 (1991); *Reserve Life Ins. Co. v. Eichenseer*, 111 S. Ct. 1298 (1991); *Hospital Auth. of Gwinnett County v. Jones*, 111 S. Ct. 1298 (1991); *Church of Scientology of Calif. v. Wollersheim*, 111 S. Ct. 1298 (1991); *International Soc. for Krishna Consciousness of Calif. v. George*, 111 S. Ct. 1299 (1991); *Pacific Lighting Co. v. MGW, Inc.*, 111 S. Ct. 1299 (1991); *Portec, Inc. v. The Post Office*, 111 S. Ct. 1299 (1991).

The Court's opinion in *Haslip* has produced mixed results in the lower courts. Some courts have acted to follow the letter of *Haslip*. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (South Carolina's punitive damages law held to violate due process); *Johnson v. Hugo's Skateaway*, 974 F.2d 1408 (4th Cir. 1992) (en banc) (Virginia's scheme for awarding punitive damages, as applied by the district court sitting in diversity, violated due process); *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 596 A.2d 687, 710 (Md. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992) ($12.5 million punitive damage award violated due process because it was "all out of proportion to both the harm caused and the perniciousness of the conduct").[6] Other courts, following the spirit of *Haslip*, have provided greater fairness in their respective state punitive damages law.[7] On the other hand, a number of lower courts have paid only "lip service" to the Court's admonition that due process places constitutional limits on punitive damages awards. *See* Gallop, Lempert & Stevens, *Post-'Haslip' Decisions on Punitive Damages: Most State Schemes Upheld*, Prod. Safety & Liab. Rptr. (BNA), March 3, 1992, at 268.

Indeed, there is so much confusion "in the fixing of punitive damages awards" (*Haslip*, 111 S. Ct. at 1043)

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[6] *See also* 596 A.2d at 711 ("Not only is the $12.5 million allowed by the court extraordinary in terms of Maryland history, it is far in excess of the actual harm caused to Evander, representing nearly fifty times the essentially liquidated compensatory damage. . . . If the $840,000 awarded in *Haslip* came 'close to the line' in terms of the actual loss suffered, this surely crosses that line").

[7] *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) (heightened burden of proof, more restrictive standard, providing defendant with option to bifurcate trial); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md.), *reconsideration denied*, 602 A.2d 1182 (Md. 1992) (heightened burden of proof).

that the West Virginia high court itself has set forth mixed messages on the issue. In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), following this Court's remand, the court reversed and remanded for new trial a punitive damage award of $105,000 to plaintiffs who alleged defendant's solid waste disposal facility constituted a nuisance, but established no compensatory damages. The court held that in West Virginia a jury may not award punitive damages without finding compensatory damages, stating: "Punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's actions and that generally means that punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm." 413 S.W.2d at 908.[8] Nevertheless, in this case, decided less than six months after *Garnes* and awarding attorneys' fees but no traditional compensatory damages, the court affirmed a $10 million punitive damages award.[9]

Predictability is needed in law, especially when it can result in harsh punishments. Some have suggested that

[8] In *Garnes*, Justice Neely, who also authored the opinion in the instant case, applauded the United States Supreme Court's opinion in *Haslip* as "a major step in the unification of America's decisional law in matters where the separate states are unable to craft a set of rational rules." 413 S.E.2d at 905.

[9] The West Virginia high court has vacillated over the past decade about whether punitive damages must bear a reasonable relationship to actual damages. Until 1982, it was settled West Virginia law that punitive "damages should bear some reasonable portion to the actual damage done else they would be unreasonable and excessive." *Pennington v. Gillaspie*, 66 S.E. 1009, 1015 (W. Va. 1910). *See also Toler v. Cassinelli*, 41 S.E.2d 672 (W. Va. 1946) (setting aside $1,000 punitive damages award with no actual damages); *Spencer v. Steinbrecher*, 164 S.E.2d 710 (W. Va. 1968) ($10,000 punitive award held not to bear reasonable proportion to $400 actual damages award). Since 1982, however, the court has delivered conflicting messages on this issue. *See Wells v. Smith*, 297 S.E.2d 872 (W. Va. 1982); *Garnes, supra*; *TXO Prod. Corp., supra*.

reform is unnecessary because, as a General Accounting Office study showed, a huge number of punitive damages awards are reversed.[10] This is precisely the reason that guidelines are needed. "Getting it right the second (or third or fourth) time around" is extremely costly and unnecessarily wasteful of both private and judicial resources. Without further guidance from the Court, punitive damages awards which "jar one's constitutional sensibilities" will remain commonplace. *See Haslip*, 111 S. Ct. at 1043. The situation cries out for involvement by the Court to provide a fair remedy.[11] Accordingly, the Court should clarify *Haslip*'s holding by issuing substantive guidelines on the restrictions imposed on punitive damages by the Due Process Clause.

B. Current Punitive Damages Law Did Not Exist In 1791; It Dates Back Only to 1967.

The principal objection to due process limitations on punitive damages is that the practice is said to have been

[10] *See* U.S. General Accounting Office; Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness; Committee on Energy and Commerce, House of Representatives, *Product Liability: Verdicts and Case Resolution in Five States* 37 (Sept. 1989).

[11] In *Garnes*, Justice Neely prophetically wrote:

> State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the *national* economy and *national* welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum. (Emphasis in original).

Garnes, 413 S.E.2d at 905. *See also Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991).

in place at the time the Bill of Rights was adopted. *See Pacific Mutual Life Insurance Co. v. Haslip*, S. Ct. U.S. Oral Arguments, Vol. 3, Case No. 89-1279, p. 22 (Oct. Term 1990) (question by Scalia, J.) ("[W]ho whispers in my ear that [the practice of awarding punitive damages] is in violation of due process when it's been going on since 1791 and nobody has thought so?"). The practice of 1791, however, does not exist today—except in name.

1. *Punitive Damages Doctrine of 1791.*

Punitive, or exemplary, damages had their basic foundations set forth in 1763 in two English cases involving illegal searches and seizures by officers of the Crown.[12] In *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), the first case to use the term "exemplary damages," and its companion case, *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), English courts for the first time expressed that "the punitive and deterrent purposes of damage awards could be separated from their compensatory function." Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 14 (1982).[13]

Huckle and *Wilkes* were followed by cases approving punitive damages awards in a narrow category of torts

[12] *See* Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1120 (1984); Comment, *Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 Ohio St. L.J. 771, 772 (1981). *See also Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure); *Bruce v. Rawlins*, 95 Eng. Rep. 934 (C.P. 1770) (illegal search and seizure); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) (illegal search and seizure).

[13] In *Wilkes*, Lord Chief Justice Pratt announced: "[A] jury shall have it in their power to give damages for more than the injury received . . . . as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." 98 Eng. Rep. at 498-99. *See also* Sales & Cole, *supra* note 12, at 1120 n.8; Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1266 (1987).

involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery,[14] malicious prosecution,[15] false imprisonment,[16] and trespass.[17] Punitive damages were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in eighteeenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 St. Mary's L.J. 351, 355 (1983).[18]

As in England, punitive damages in colonial America (and through the nineteenth and into the twentieth centuries)[19] were available only in a "comparatively small

[14] *See, e.g., Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766).

[15] *See, e.g., Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1799); *Hewlett v. Cruchley*, 128 Eng. Rep. 696 (K.B. 1813).

[16] *See, e.g., Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1774).

[17] *See, e.g., Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814); *Sears v. Lyons*, 171 Eng. Rep. 658 (K.B. 1818). Punitive damages were also allowed for seduction. *See, e.g., Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769). And, for a period, English courts permitted an award of punitive damages for criminal conversation (*i.e.*, adultery). *See, e.g., Duberly v. Gunning*, 100 Eng. Rep. 696 (K.B. 1813).

[18] *See also* Schwartz & Magarian, *Challenging The Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 American Bus. L.J. 485 (1990); Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 Marq. L. Rev. 369, 371 (1965); Freifield, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5, 7 (1935). *See generally* W. Prosser & P. Keeton, *The Law of Torts* § 2, at 8 (5th ed. 1984).

[19] The use of "private attorneys general" to sanction antisocial conduct unregulated by the criminal law reached America in 1784. *See Genay v. Norris*, 1 S.C. 6 (1784). *See also* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1263, 1287-88 (1976).

class of torts," T. Street, *The Foundations of Legal Liability* 479 (1906)—"the traditional intentional torts." *Symposium Discussion*, 56 S. Cal. L. Rev. 155, 156 (1982) (remarks by Professor Dorsey Ellis, Jr.).[20] They included: assault and battery,[21] libel and slander,[22] malicious prosecution,[23] false imprisonment,[24] and intentional interferences with property such as trespass and conversion, malicious attachment, or destruction of property,[25]

[20] *See, e.g., McWilliams v. Bragg*, 3 Wis. 424, 428-29, 431 (1854) ("[I]n the English courts, the rule or measure of damages in actions for *willful torts*, and especially *personal injuries*, is not confined to mere *compensation* . . . but to some extent as a punishment. . . . 3 Wis. at 428-29 (emphasis in original). [T]he great weight of authority in American courts is in favor of permitting juries in actions of this character . . . to impose what is sometimes termed *exemplary*, and sometimes *punitory* damages, in addition to the actual damages." 3 Wis. at 431 (emphasis in original).

[21] *See, e.g., Corwin v. Watson*, 18 Mo. 71 (1853); *Porter v. Seiler*, 23 Pa. 424 (1854); *Lyon v. Hancock*, 35 Cal. 372 (1868); *Ward v. Blackwood*, 41 Ark. 295 (1883); *Trogden v. Terry*, 172 N.C. 540 (1916).

[22] *See, e.g., Vunck v. Hull*, 3 N.J.L. 814 (1809); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67 (1849); *Benaway v. Coyne*, 3 Pin. 196 (Wis. 1851); *Sheik v. Hobson*, 64 Iowa 146 (1884); *Louisville & Nashville R.R. Co. v. Ballard*, 85 Ky. 307 (1887); *Coffin v. Brown*, 50 A. 567 (Md. 1901); *Ellis v. Brockton Pub. Co.*, 84 N.E. 1018 (Mass. 1908).

[23] *See, e.g., Brown v. McBride*, 24 Misc. 235, 52 N.Y.S. 620 (1898); *Jackson v. American Tel. & Tel. Co.*, 51 S.E. 1015 (N.C. 1905).

[24] *See, e.g., Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893); *Schlencker v. Risley*, 4 Ill. 483 (1842); *Taber v. Hutson*, 5 Ind. 322 (1854); *Parsons v. Harper*, 57 Va. 64 (1860); *Hamlin v. Spaulding*, 27 Wis. 360 (1869); *Green v. Southern Express Co.*, 41 Ga. 515 (1871); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350 (1887).

[25] *See, e.g., Taylor v. Giger*, 3 Ky. 586 (1803); *North v. Cates*, 5 Ky. 591 (1812); *Treat v. Barber*, 7 Conn. 274 (1828); *Huntley v. Bacon*, 15 Conn. 267 (1842); *Clark v. Bales*, 15 Ark. 452 (1855); *Schindel v. Schindel*, 12 Md. 108 (1858); *Dorsey v. Manlove*, 14

private nuisance,[26] and other conduct amounting to reckless endangerment.[27]

2. *The Broadened Standard By Which Punitive Damages Now Are Awarded.*

Commencing in the late 1960's, several significant legal developments led courts to depart radically from the historical "intentional tort" moorings of punitive damages law; *i.e.*, the law of 1791. First, courts began to apply punitive damages in the developing field of products liability.[28] Second, the advent of "mass tort" litigation[29] resulted in an explosion of claims against manufacturers of such products as asbestos, formaldehyde, DES, Agent Orange, automobiles, tampons, and the Dalkon Shield IUD.[30]

Cal. 553 (1860); *Lynd v. Picket*, 7 Minn. 184 (1862); *Brown v. Allen*, 35 Iowa 306 (1872); *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455 (1877); *Bradshaw v. Buchanan*, 50 Tex. 492 (1878); *Huling v. Henderson*, 161 Pa. 553 (1894).

[26] *See, e.g., Yazoo v. Mississippi Valley R.R. Co. v. Sanders*, 87 Miss. 607 (1906); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361 (1914).

[27] *See, e.g., Whipple v. Walpole*, 10 N.H. 130 (1839); *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Pickett v. Crook*, 20 Wis. 358 (1866); *Meibus v. Dodge*, 38 Wis. 300 (1875). As in England, punitive damages were also permitted in cases involving seduction. *See, e.g., Coryell v. Colbaugh*, 1 N.J.L. 77 (1791); *Mcaulay v. Birkhead*, 35 N.C. 28 (1851); *Reutkemeier v. Nolte*, 179 Iowa 342 (1917).

[28] In 1967, a California Court of Appeal held for the first time that punitive damages were recoverable in a strict product liability action. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Since then, punitive damages awards in product liability cases have proliferated.

[29] "Mass tort" litigation began in the late 1960's with cases involving the sale of the anti-cholesterol drug MER/29. *See* Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Cal. L. Rev. 116 (1968); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) (Friendly, J.).

[30] *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52

Third, courts began—contrary to 200-year old precedent—to permit recovery of punitive damages in contract actions, such as breach of an implied duty of good faith and fair dealing.[31] As Justice O'Connor pointed out in the dissent in *Haslip*, "Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards." *Haslip*, 111 S. Ct. at 1066.[32] Together, these radical changes of the past twenty-five years have provided punitive damages a significant and unprecedented role in the law—a role which did not exist in 1791.

Relaxed standards for awarding punitive damages are also responsible for the very different role punitive damages play in the law today. As described above, punitive damages in their origins were confined to conscious and

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Fordham L. Rev. 37, 51-52 (1983); Jeffries, *A Comment on The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986). Several courts have acknowledged that due process may be implicated in "mass tort" punitive damages awards cases. *See Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J.), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds sub nom., Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 111 S. Ct. 246 (1990); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 283 (D.N.J. 1989).

[31] *See, e.g., Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973); *United States Fidelity & Guar. Co. v. Peterson*, 540 P.2d 1070 (Nev. 1975). *See also* Prosser & Keeton, *supra* note 18, at 11. Contract bad faith punitive damages actions are now accepted by a majority of jurisdictions. Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation, *Punitive Damages: A Constructive Examination* 5-2, 5-3 (1986).

[32] Punitive damages for breach of contract are not limited to the insurance area; some jurisdictions permit recovery of punitive damages for breach of consumer contracts. *See* Comment, *Sailing the Uncharted Seas of Bad Faith: Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 69 Minn. L. Rev. 1161 (1985); Comment, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind. L. Rev. 668 (1975).

intentional misconduct. In the last twenty-five years, however, courts have considerably loosened this standard, and punitive damages have sometimes been awarded in cases involving less than intentional or conscious wrongdoing. For example, in some states, like Texas, where many large punitive damages awards are imposed,[33] "gross negligence" can support a punitive damages award.[34]

3. *The Explosion in the Size of Punitive Damages Awards In Comparison To Compensatory Damages.*

The size and frequency of punitive damages awards over the past twenty years also differ remarkably from the practice's previous 200-year history. From their origins in England and until the American legal "revolution" of the late 1960's and 1970's, punitive damages "merited scant attention" because they "were rarely assessed and likely to be small in amount." Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982). Typically, punitive damages only slightly exceeded compensatory damages awarded, if at all.[35]

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[33] *See, e.g., Naik, Woman Receives $25 Million Judgment in Bristol-Myers Breast Implant Suit*, Wall St. J., Dec. 24, 1992, at A3 ($20 million punitive damages award).

[34] *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (West 1993). *See also* Fla. Stat. Ann. § 768.73 (West 1992) ("gross misconduct"); *Wisker v. Hart*, 766 P.2d 168 (Kan. 1988) ("gross negligence"); *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991) (same).

[35] *See Southern Kan. Ry. v. Rice*, 38 Kan. 398 (1888) ($35 costs and fees, $10 injury to feelings, $71.75 punitive); *Taylor v. Grand Trunk Ry. of Canada*, 48 N.H. 304 (1869) ($500 actual damages, $858.50 exemplary); *Woodman v. Town of Nottingham*, 49 N.H. 387 (1870) ($578 actual, $100 exemplary); *Fay v. Parker*, 53 N.H. 342 (1872) ($150 actual, $331.67 exemplary). *See also* R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A State By State Guide To Law And Practice* § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the

Beginning with the late 1960's, however, the size and frequency of punitive damages awards slowly began to increase.[36] Then, in the late 1970's and 1980's, their size "increased dramatically" (Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982)), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[37] Jeffries, *supra* note 30, at 142. "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case." Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919 (1989) (cited by O'Connor, J., dissenting in *Haslip*, 111 S. Ct. at 1066)).[38]

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punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves").

[36] Before 1976, for example, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages awards in each case were modest in proportion to the compensatory damages awarded. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) ($175,000 compensatory, $250,000 punitive damages); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory damages, $50,000 attorneys' fees, $100,000 punitive damages); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970) ($920,000 compensatory damages, $10,000 punitive damages).

[37] *See also* P. Huber, *The Legal Revolution and its Consequences* (1988); W. Olson, *The Litigation Explosion* (1991); S. Turner, *et al., Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992).

[38] This trend of "juries . . . award[ing] substantial punitive damages with increasing frequency" (Borowsky & Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. Rev. 147, 150 (1983)) is illustrated by West Virginia's experience. Between 1968 and 1985, the West Virginia appellate court affirmed only *one* judgment for punitive damages against a business enterprise. But, since 1985, the court has affirmed 10 such awards, of steadily increasing size—the $10 million punitive damages award in this case was the highest affirmed.

This explosive trend is supported by empirical data. A very recent study of punitive damages awards in California, Illinois, New York and Texas (states containing thirty-one percent of the U.S. population) conducted by Texaco Inc., using conservative and reliable methodology and data,[39] found that, after correcting for inflation, the amounts of punitive damages awarded in the four states skyrocketed 117-fold (from $800,000 to $312 million) in the twenty years from 1968-1971 to 1988-1991—reflecting a much faster growth than even compensatory damages awards (up fifty-one times).[40] Texaco, Inc., *An Empirical Study of Final Judgments Awarding Punitive Damages* (presented Oct. 15, 1992).[41] In comparison, the U.S. Gross National Product less than doubled in the same two decades. U.S. Bureau of the Census, *Statistical Abstract of the United States*, 1991, 431 (111th ed. 1991). The results of the Texaco study are consistent with a comprehensive analysis of jury verdicts in the United States

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[39] The Texaco study included only awards reported in appellate decisions that affirmed judgments for punitive damages. No reliance was made on jury verdict reporters or on any anecdotal evidence; thus, the figures represent the actual awards against defendants as punitive damages.

[40] *See* S. Turner, *et al., supra* note 37, at 2-4. The study also found that punitive damages were awarded five times more often in the most recent period. *Id.*

[41] Copies of this unpublished presentation were served on counsel for Petitioner and Respondents and lodged with the Clerk of the Court in the Brief Of *Amici Curiae* American Petroleum Institute and National Association of Manufacturers In Support of Petitioner.

prepared by the RAND Institute for Civil Justice several years ago.[42]

In sum, the practice of awarding punitive damages as it existed in 1791 and through the late 1960's, confined to modest penalties in a few cases of intentional harms such as assault, shares only a name with the contemporary flood of huge awards for an act or course of conduct that may be unintentional.

II. THE APPROPRIATE STANDARD FOR AWARDING PUNITIVE DAMAGES IS INTENTIONAL INFLICTION OF HARM OR CONSCIOUS DISREGARD OF SAFETY.

In the instant case, the West Virginia court held that punitive damages are properly awarded against both "really mean" and "really stupid" defendants. *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 887 (W. Va. 1992). The court also held that the "outer limit" of punitive damages awards against "really stupid" defendants is "*roughly* five to one." 419 S.E.2d at 889 (emphasis in original). The court went on to find, however, that TXO's "harmful acts" were not due to mere stupidity, but were "*fraudulent*," "mean-spirited," and "*intentionally* undertaken." 419 S.E.2d at 889 (emphasis in original). It then affirmed a jury verdict awarding $10 million in punitive damages to Respondents,

[42] *See* M. Peterson, S. Sarma, & M. Stanley, *Punitive Damages—Empirical Findings* ix (1987) ("The largest punitive damages awards have increased greatly in size, sharply increasing both the average award and the total dollars awarded") [hereinafter RAND Study]. The RAND Study covered all civil jury trials in Cook County, Illinois, and San Francisco, California, from 1960 to 1984, and all civil jury trials throughout California from 1980 to 1984. RAND Study at *v*. *See also* D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987) (growth in the average award in product liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984).

who sustained at most $19,000 worth of "damages"—for legal fees.

There are two fundamental flaws in the court's decision to apply constitutional limits to "really stupid" defendants, but not against defendants who are "really mean." First, punitive damages traditionally have been treated as wholly inappropriate against what the court below called "really stupid" defendants. Since the historic case of *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837), the penalties embodied in the law of negligence itself have been regarded as a sufficient penalty for "stupid" conduct, be it negligent or grossly negligent. Such behavior is part of and is adequately deterred by general tort law (*cf. Smith v. Wade*, 461 U.S. 30, 50 (1983)) through such universally accepted mechanisms as damages for pain and suffering and the collateral source rule (which prohibits a defendant from introducing evidence that a plaintiff has been compensated for his or her injuries by a "collateral source," such as an insurer).[43]

This Court has, in fact, consistently recognized that punitive damages should be reserved for situations where the defendant has exhibited intentional infliction of harm or a conscious disregard of safety. *See Smith*, 461 U.S. at 41, 41 n.9, 42, 42 n.10 (containing thorough discussion of the Court's decisions in this area). Indeed, in *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1876), a diversity railroad collision case, the Court expressly held erroneous a jury instruction allowing a puni-

[43] *See generally* Note, *Exemplary Damages in The Law of Torts*, 70 Harv. L. Rev. 517, 523 (1957):

> If an act is particularly wrongful, society imposes criminal sanctions in order to deter the wrongdoer and others from repeating the offense. But *while some faults, such as ordinary negligence should be discouraged, they do not warrant the stigma and severity of criminal punishment. Such deterrence is effected in tort law by shifting the loss:* the defendant is forced to repair the harm done to the plaintiff. (Emphasis added).

tive damages award for "gross negligence." It found that the term was "too vague, and too likely to be confused with mere ordinary negligence to provide a fair standard." *Smith*, 461 U.S. at 42.[44] More recently, in *Haslip*, the Court approvingly noted: "The trial court specifically found the conduct in question 'evidenced intentional, malicious, gross, or oppressive fraud.'" *Haslip*, 111 S. Ct. at 1046.

Conduct which falls short of conscious or intentional wrongdoing should not be permitted to pollute the common law of punitive damages. This Court should find that the West Virginia court erred in holding—contrary to settled law—that punitive damages can be awarded against the so-called "'really stupid' punitive damages defendant." 419 S.E.2d at 887.

The other fundamental flaw in the West Virginia court's decision, discussed more fully in Section III below, is that the opinion suggests that constitutional limits do not apply to defendants "who intentionally commit acts they know to be harmful," 419 S.E.2d at 889; *i.e.*, the so-called "'really mean' punitive damages defendant." 419 S.E.2d at 887. To the contrary, *Haslip* and following decisions have held that constitutional protections against excessive awards must be applied in this permissible zone of punitive damages.

III. THE AWARD IN THIS CASE VIOLATED DUE PROCESS BECAUSE OF EXCESSIVENESS.

In *Haslip*, the Court indicated that a punitive damages award exceeding four times the compensatory damages awarded was "close to the line" of violating due process

[44] *See also Philadelphia, Wilmington & Baltimore R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) (punitive damages proper where "the act complained of was conceived in *the spirit of mischief, or of criminal indifference to civil obligations*") (emphasis added); *Denver v. Rio Grande Ry. v. Harris*, 122 U.S. 597, 609-10 (1887) (same); *Barry v. Edmunds*, 116 U.S. 550, 563 (1885) (same) (citing cases).

because of excessiveness. *See Haslip*, 111 S. Ct. at 1043.[45] The punitive award in this case exceeds 526 times the legal fees awarded as "damages" to Respondents. This outrageous and disproportionate award "surely crosses th[e] line" set forth in *Haslip*. *See Alexander & Alexander, Inc.*, 596 A.2d at 711.[46]

The excessiveness of the award in the instant case is more graphically measured against fines for crimes, including fraud, which are also commonly considered torts. Such fines represent "an objective indicator of contemporary values" for appropriate penalties for deviant conduct, as expressed by elected representatives. *See Perry v. Lynaugh*, 492 U.S. 302, 335 (1988). The Appendix, which lists fines for crimes that are also torts in eight states and the District of Columbia, shows that the largest fine found necessary for punishment and deterrence of fraud is $50,000. *See* Cal. Penal Code § 548 (West 1992) (defrauding or prejudicing insurer). West Virginia has decided that $10,000 is the maximum monetary criminal penalty which can be imposed for fraud (*see* W. Va. Code § 61-3C-4 (Michie 1992) (computer fraud))—an amount a *thousand* times *less* than the punitive damages award in this case. In fact, compared to any criminal fine in any state, the $10 million punitive damages award in this case—purportedly levied to achieve essentially the same societal goals as the criminal law—is ludicrous.

[45] *Haslip* makes an excellent "measuring stick" for the excessiveness of the punitive damages award in the instant case. Both cases involved alleged "*fraudulent*" conduct "*intentionally* undertaken." *TXO Prod. Corp.*, 419 S.E.2d at 889 (emphasis in original). *See Haslip*, 111 S. Ct. at 1046.

[46] The award in the instant case is excessive even by standards adopted by the West Virginia court in *Garnes, supra*. There, the court held that "punitive damages must bear a reasonable relationship to actual damages. . . ." 413 S.W.2d at 908. The instant case involved no traditional compensatory damages, only legal fees.

The huge discrepancy between civil and criminal penalties is particularly distressful when one recalls that the criminal defendant, of course, is given a full panoply of constitutional protections, such as a right against excessive fines and a right not to be held in double jeopardy. These rights are generally not available to the civil punitive damages defendant. Further, in criminal law, the accused must be proven guilty "beyond a reasonable doubt;" and the determination of guilt is clearly separate from proceedings on sentencing.

IV. THE COURT SHOULD FORMULATE GENERAL STANDARDS TO HELP GUIDE COURTS ABOUT EXCESSIVENESS.

Since *Haslip*, at least two courts, including the West Virginia Supreme Court (*see Garnes*, 413 S.E.2d at 908) and the Maryland Court of Special Appeal (*see Alexander & Alexander, Inc.*, 596 A.2d at 710) have focused their decisions on the important relationship between punitive and compensatory damages, striking down excessive punitive damages awards. The *amici* suggest, however, that this Court formulate general standards to help guide courts to determine what is excessive. Proposals have been advanced by non-advocacy organizations such as the American College of Trial Lawyers and the American Law Institute.

The recommendation of the American College of Trial Lawyers, a group of trial attorneys experienced in representing both plaintiffs and defendants, would limit punitive damages to twice the amount of compensatory damages or $250,000, whichever is greater.[47] A 1991 report

[47] *See* American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 15 (1989) [hereinafter ACTL Report]. *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (West 1993) (punitive damages limited to four times actual damages or $200,000, whichever is greater); Nev. Rev. Stat. § 42.005 (Michie 1991) (punitive damages awards limited to $300,000 in cases in which compensatory damages are less than $100,000, and to three times the amount of compensatory damages in cases of $100,000 or more).

by scholars of the American Law Institute[48] similarly endorsed the concept of a ratio coupled with an alternative monetary ceiling ("perhaps $25,000") for cases "in which the plaintiff's harms were minimal even though the defendant's behavior was egregious."[49]

Unlike other approaches, which use only a ratio to compensatory damages to limit punitive damages awards,[50] these proposals provide the trier of fact with great flexibility to do justice in the rare situation where a defendant has engaged in heinous conduct with a huge potential for harm, but which resulted in little actual harm (*e.g.*, the defendant throws harmful acid at a person's face, but misses, causing only minimal clothing damage). Under either proposal, the Court could assess punitive damages up to the fixed monetary ceiling (*e.g.*, $25,000 or

[48] *See* American Law Institute, *Enterprise Responsibility for Personal Injury—Reporters' Study* (Vol. II) (1991) [hereinafter ALI Reporters' Study]. *See generally* Schwartz & Behrens, *The American Law Institute Reporters' Study On Enterprise Responsibility For Personal Injury: A Timely Call For Punitive Damages Reform*, 30:2 San Diego L. Rev. — (1993) (in print).

[49] ALI Reporters' Study (Vol. II) at 259. The Reporters' Study does not recommend a specific ratio of punitive to compensatory damages which states should adopt. *See id.* ("Our concern in this Report is to endorse the substantive principle of the ratio of punitive to compensatory damages, not to commit ourselves to specific judgments about each of the issues in the operative formula").

[50] *See, e.g.*, Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation, *supra* note 31 (proposing a three to one ratio of punitive to compensatory damages); Conn. Gen. Stat. § 52-240a (West 1992) (limiting punitive awards to twice compensatory damages); Council on Competitiveness Report, *Model Punitive Damages Act* (1991) (limiting punitive damages to amount of compensatory damages awarded); Colo. Rev. Stat. § 13-21-102 (West 1992) (same).

$250,000) without being handcuffed to a strict ratio corresponding to compensatory damages.[51]

It is important to note that, for due process reasons, any ratio construct is subject to challenge on grounds of excessiveness in two situations: (1) where the defendant is being subjected to repeated punishment for what was essentially a single act or course of conduct (*see* Schwartz & Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 Adelphia L.J. 101 (1992)); and (2) where the case involves a very large compensatory damages award. *See TXO Production Corp.*, 419 S.E.2d at 889 n.12. In these situations, strict adherence to a fixed ratio may overkill the deterrent effect of the punitive damages award and be excessive.[52]

In sum, this Court in *Haslip* indicated that due process places limits on punitive damages awards. The Court's opinion, however, has produced mixed results in the lower courts. As a result, punitive damages awards continue to "run wild." *See Haslip*, 111 S. Ct. at 1043. A fair and predictable remedy is needed. This Court should provide to state legislatures and lower courts general guidelines

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[51] *See Garnes*, 413 S.E.2d at 902; Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181 (1931). Opponents of these proposals may argue that in such a case $250,000 is an insufficient punishment. This argument approaches the frivolous when one looks at criminal fine punishments for similar wrongful conduct. *See* Appendix.

[52] Whatever limits the Court should deem appropriate, it is important that the jury should not be informed of the limit, and that a jury's award for punitive damages exceeding the limit should be reduced by the judge. *See* ACTL Report at 15. If the jury is informed of the dollar or ratio limit, the jurors may perceive it as a guideline for assessing punitive damages, rather than a ceiling; and, the jurors could be influenced in their findings on compensatory damages by the knowledge of the effect those findings could have on punitive damages.

about excessiveness which can be applied in future cases. Further, this Court should make clear that the appropriate standard for punitive damages liability is intentional infliction of harm or conscious disregard of safety. Any lesser conduct is merely a part of and is adequately deterred by general tort law.

CONCLUSION

The judgment below should be reversed, and the case remanded for re-determination of punitive damages in accordance with guidelines prescribed by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

CALIFORNIA

Title and Section in the *West's Annotated California Codes*	Description	Fine
Rev. & Tax Code § 19401	Return or information unfiled, false, or fraudulent; intent to evade tax	not more than $20,000
Penal Code § 126	Perjury	incarceration only
Penal Code § 165	Bribery	incarceration only
Penal Code § 241	Assault	not exceeding $1,000
Penal Code § 243	Battery	not exceeding $2,000
Penal Code § 487	Grand Theft	incarceration only
Penal Code § 490	Petty Theft	not exceeding $1,000
Penal Code § 490.1	Petty theft where value taken is under $50	not exceeding $250
Penal Code § 514	Embezzlement	not exceeding $1,000; if value is under $50, not exceeding $250
Penal Code § 548	Defrauding or prejudicing insurer	not exceeding $50,000
Penal Code § 549	False or fraudulent claims against insurers	not exceeding $1,000
Penal Code § 558	Entry upon described lands forbidden	not more than $600

DISTRICT OF COLUMBIA

Title and Section in the *District of Columbia Code*	Description	Fine
§ 22-504	Assault or threatened assault in a menacing manner	not more than $500
§ 22-712	Bribery	not more than $25,000 or 3 times the monetary equivalent of the thing of value, whichever is greater
§ 22-2511	Perjury	not more than $5,000
§ 22-3102	Unlawful entry on property	not more than $100
§ 22-3812	Penalties for theft	not more than $5,000 for 1st degree; not more than $1,000 for 2nd degree
§ 22-3822	Penalties for fraud	For first degree fraud— not more than $5,000 or 3 times the value of the property, whichever is greater, if the value of the property is $250 or more; not more than $1,000 if the value of the property is $250 or less. For second degree fraud— not more than $3,000 or 3 times the value of the property, whichever is greater, if the value of the property is $250 or more; not more than $1,000 if the value of the property is $250 or less.
§ 47-1813.6	Tax Evasion	not more than $5,000 for willful offense; not more than $3,000 for nonwillful offense

ILLINOIS

Title and Section in the *Smith-Hurd Illinois Annotated Statutes*	Description	Fine
38 § 12-1	Assault	not to exceed $500
38 § 12-3	Battery	not to exceed $1,000
38 § 16-1	Theft	not more than $1,000 on property valued at $300 or less; not more than $10,000 on property valued between $300 and $10,000; $10,000 or greater amount stated in offense on property valued between $10,000 and $100,000; $10,000 or greater amount stated in offense on property valued $100,000 or more.
38 § 17-8	Health care benefits fraud	not to exceed $1,000
38 § 21-3	Criminal trespass	not to exceed $500
38 § 32-2	Perjury	not to exceed $10,000
38 § 33-1	Bribery	not to exceed $10,000

MARYLAND

Title and Section in the *Annotated Code of Maryland*	Description	Fine
Art. 27, § 12	Assault	incarceration only
Art. 27, § 23	Offering bribe to or receiving bribe by public officer	not less than $100 not more than $5,000
Art. 27, § 173	Fraud—Conversion of partnership money	not more than $5,000
Art. 27, § 209	Fraud—Receiving premiums after insolvency	not more than $500
Art. 27, § 342	Theft	a value of $300 or greater shall restore property to owner or pay the value of the property or services and be fined not more than $1,000; a value of $300 or less shall restore property to owner or pay him the value of the property or services and be fined not more than $500
Art. 27, § 439	Perjury	incarceration only
Art. 27, § 576	Trespass on posted property	not exceeding $500
Tax General § 13-1001	Willful failure to file return	not exceeding $5,000 for income tax

MICHIGAN

Title and Section in *Michigan Statutes Annotated*	Description	Fine
Penal Code § 28.276(1)	Assault without weapon and infliction of serious injury without certain intent	not more than $500
Penal Code § 28.313	Bribe	not more than $5,000
Penal Code § 28.371	Embezzlement	not more than $100 if valued at $100 or under; not more than $5,000 if valued at more than $100
Penal Code § 28.588	Larceny	not more than $2,500 if value of property stolen exceeded $100; not more than $100 if property stolen valued at $100 or less
Penal Code § 28.594	Larceny by conversion or embezzlement	not more than$2,500 if value of property exceeded $100; not more than $100 if property stolen valued at $100 or less
Penal Code § 28.664	Perjury committed in courts	incarceration only
Penal Code § 28.815	Willful trespass	not more than $100
Penal Code § 28.824	Wage discrimination	not more than $100

NEW YORK

Title and Section in *New York Consolidated Laws*	Description	Fine
Penal Law § 120.00	Assault in the third degree	not exceeding $1,000
Penal Law § 120.05	Assault in the second degree	not exceeding $5,000
Penal Law § 120.10	Assault in the first degree	not exceeding $15,000
Penal Law § 140.10	Criminal trespass in the third degree	not exceeding $500
Penal Law § 140.15	Criminal trespass in the second degree	not exceeding $1,000
Penal Law § 140.17	Criminal trespass in the first degree	not exceeding $5,000
Penal Law § 155.25	Petit Larceny	not exceeding $1,000
Penal Law § 155.40	Grand Larceny in the second degree	not exceeding $15,000
Penal Law § 155.42	Grand Larceny in the first degree	not exceeding $30,000
Penal Law § 170.15	Forgery in the first degree	not exceeding $15,000
Penal Law § 185.05	Fraud involving a security interest	not exceeding $1,000
Penal Law § 190.05	Issuing a bad check	not exceeding $500
Penal Law § 200.00	Bribery in the third degree	not exceeding $5,000
Penal Law § 200.03	Bribery in the second degree	not exceeding $15,000
Penal Law § 200.04	Bribery in the first degree	not exceeding $30,000
Penal Law § 210.10	Perjury in the third degree	not exceeding $1,000
Penal Law § 210.10	Perjury in the second degree	not exceeding $5,000
Penal Law § 210.015	Perjury in the first degree	not exceeding $5,000
Tax Law § 1801	Failure to file a return or report	not exceeding $1,000
Tax Law § 1802	Repeated failure to file	not exceeding $5,000

TEXAS

Title and Section in *Vernon's Texas Codes Annotated*	Description	Fine
Penal Code § 22.01	Assault	not to exceed $3,000
Penal Code § 30.05	Criminal Trespass	not to exceed $1,500
Penal Code § 31.03	Theft (includes embezzlement)	not to exceed $500 if value of property stolen is less than $20; not to exceed $1,500 if value of property stolen is less than $200; not to exceed $3,000 if value of property stolen is less than $750; not to exceed $10,000 if value of property stolen is $750 or more
Penal Code § 32.21	Forgery	not to exceed $3,000
Penal Code § 32.34	Fraud in Insolvency	not to exceed $3,000
Penal Code § 32.41	Issuance of Bad Check	not to exceed $500
Penal Code § 32.45	Misapplication of Fiduciary Property	not to exceed $3,000 if value of property is less than $200; not to exceed $10,000 if value of property is more than $200
Penal Code § 36.02	Bribery	not to exceed $10,000
Penal Code § 37.02	Perjury	not to exceed $3,000

VIRGINIA

Title and Section in the *Code of Virginia*	Description	Fine
§ 18.2-57	Assault and battery	not more than $2,500
§ 18.2-95	Grand larceny (includes embezzlement)	not more than $2,500
§ 18.2-96	Petit larceny	no more than $2,500
§ 18.2-119	Trespass	not more than $2,500
§ 18.2-181	Issuing bad check	not more than $2,500
§ 18.2-204	False statement for the purpose of defrauding industrial sick benefit company	not more than $500
§ 18.2-434	Perjury	not more than $2,500
§ 18.2-449	Bribery	not more than $100,000
§ 58.1-3916.1	Criminal penalties for failure to file returns; false statements	not more than $500 if tax assessed is $1,000 or less; not more than $1,000 if tax assessed is more than $2,500

WEST VIRGINIA

Title and Section in the *West Virginia Code*	Description	Fine
§ 11-9-10	Attempt to evade tax	not more than $10,000
§ 61-2-9	Malicious or unlawful assault; battery	not exceeding $500
§ 61-3-12	Entry of building other than dwelling	not exceeding $100
§ 61-3-13	Grand and petit larceny	not exceeding $500 if value of property stolen is $200 or more; not exceeding $100 if value of property stolen is $200 or less
§ 61-3-24	Obtaining money, proeprty and services by false pretenses	not more than $500
§ 61-3-24a	Obtaining or attempting to obtain goods, property or service by false or fraudulent use of credit cards or other false or fraudulent means	not more than $500
§ 61-3-38	Publiction of false advertisements	not more than $100
§ 61-3-39a	Making, issuing worthless check	not more than $100
§ 61-3B-2	Trespass in structure or conveyance	not more than $500
§ 61-3C-4	Computer fraud	not more than $10,000
§ 61-5-3	Perjury	not more than $1,000
§ 61-5-7	Bribery	not more than $5,000
§ 61-3-37	Publication of false statement as to financial condition of person, firm or corporation	not more than $1,000

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No. 92-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

Petitioner,

—v.—

ALLIANCE RESOURCES CORP.; TUG FORK LAND COMPANY; GEORGE KING; AND GROVER C. GOODE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICUS CURIAE CHURCH OF SCIENTOLOGY OF CALIFORNIA IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF OF AMICUS CURIAE CHURCH OF SCIENTOLOGY OF CALIFORNIA IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE[1/]

As petitioner emphasized in its petition, "[t]his case presents the quintessential example of punitive damages 'run wild.' *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032,

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[1/] The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

1043 (1991)." Petition for a Writ of Certiorari of TXO Production Corp., p. 2. Like petitioner, *Amicus* has also been the victim of a runaway punitive damage award. In *Wollersheim* v. *Church of Scientology of California*, Los Angeles Superior Court No. C332827, a jury returned a verdict of $5,000,000 in compensatory and $25,000,000 in punitive damages in favor of a former Church member who sued for emotional distress allegedly arising out of his participation in the Church's peaceful and non-violent religious practices.

That verdict has been and remains the subject of ongoing appellate review on, *inter alia*, precisely the range of issues encompassed by the present case in which this *amicus* brief is filed.

First, on July 18, 1989, the California Court of Appeal found that both the compensatory and punitive damage awards were the product of passion and prejudice, and that the punitive damage award in particular was "preposterous." *Wollersheim* v. *Church of Scientology of California*, 212 Cal. App. 3d 872, 260 Cal. Rptr. 311 (Cal. App. 1989). Having so found,[2/] the Court of Appeal nevertheless refused to order a new trial, but reduced the judgment to $500,000 compensatory damages and $2,000,000 punitive damages.

Second, after the California Supreme Court denied review, this Court granted *Amicus'* petition for writ of certiorari which asserted that the award of punitive damages, even as modified, violated due process, and remanded to the

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[2/] Under California law, an appellate court may not reduce or reverse a punitive damage award on the ground that it is merely excessive, but only upon a finding that it is the product of passion and prejudice. *Adams* v. *Murakami*, 54 Cal. 3d 105, 118 n.9, 284 Cal. Rptr. 318, 813 P.2d 1348 (Cal. 1991); *Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 64-65 & n.12, 118 Cal. Rptr. 184, 199-200 & n.12, 529 P.2d 608 (Cal. 1974).

California Court of Appeal for reconsideration in light of *Haslip*. *Church of Scientology of California* v. *Wollersheim*, 111 S. Ct. 1298 (1991).

Third, on remand, the California Court of Appeal reaffirmed its prior decision, holding that the California system of awarding and reviewing punitive damages does not violate due process. *Wollersheim* v. *Church of Scientology of California*, 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532 (Cal. App. 1992). In so holding, the Court of Appeal devoted one scant paragraph to the Church's principal argument that, in light of the finding that the jury's verdict was the product of passion and prejudice, a new trial was required on all issues.

Fourth, on July 23, 1992, the Supreme Court of California granted *Amicus'* petition for review of the new decision by the California Court of Appeal, but ordered briefing and argument of the appeal delayed pending the California Supreme Court's review of two similar punitive damage cases, *MGW Inc.* v. *Fredericks Development Corp.* (Cal. Sup. Ct. No. S015966) and *Gourley* v. *State Farm Mutual Ins. Co.* (Cal. Sup. Ct. No. S014133). *Wollersheim* v. *Church of Scientology of California*, 10 Cal. Rptr. 2d 182, 832 P.2d 898 (Cal. 1992). On December 2, 1992, however, the California Supreme Court suspended briefing and argument in the *MGW* and *Gourley* cases as well, pending this Court's decision in the instant case.

Thus, in a very real sense this Court's determination of the instant case is likely to have a direct effect upon *Amicus'* pending appeal in the California Supreme Court. But while many of the issues in the instant case are congruent with the issues in *Amicus'* pending appeal, at least one due process issue raised by *Amicus*, while of great general importance in the standards for reviewing punitive damage awards, is not likely to be raised in depth by the parties to the instant case. That issue concerns the proper disposition of a case where the

court finds that a jury's punitive damage verdict (and indeed its compensatory damage verdict) was the product of passion and prejudice. The issue indisputably is encompassed in the instant case, where the jury's punitive damage award of $10,000,000, or more than 526 times the compensatory award, clearly suggests a jury verdict "run wild" with passion and prejudice against the defendant.

SUMMARY OF ARGUMENT

Amicus urges this Court to hold that due process prohibits an appellate court from merely reducing a punitive damage verdict found to be the product of passion and prejudice to a figure which an appellate court deems would have been appropriate for a non-prejudicial jury to award as punitive damages. Rather, where punitive damages have so "run wild" that they are the product of passion and prejudice, due process ordinarily requires an appellate court to order a new trial, both on damages and liability. Even were the Court not to require a new trial on all issues in such cases, at a minimum the Court should articulate standards which appellate courts should utilize in determining under what circumstances passion or prejudice infected verdicts should be reversed in their entirety, reversed in part, or reduced.

ARGUMENT

DUE PROCESS REQUIRES A NEW TRIAL WHERE A JURY'S PUNITIVE DAMAGE AWARD IS THE PRODUCT OF PASSION AND PREJUDICE

In cases, as here, where the punitive damage award is hundreds of times the compensatory damage award, it is at least highly suggestive of passion and prejudice. *Auster Oil &*

Gas, Inc. v. *Stream*, 835 F.2d 597, 603 n.5 (5th Cir.), *cert. denied*, 488 U.S. 848 (1988) ("at some point a verdict can be so excessive as to constitute a *per se* indication of prejudice and passion, and require a new trial"); *Wells* v. *Dallas Independent School District*, 793 F.2d 679, 683-84 (5th Cir. 1986) (same). In fact, the West Virginia Supreme Court of Appeal's opinion in this case invokes a standard which *invites* juries and appellate courts, in obvious violation of due process, to decide cases and impose punitive damages precisely on the basis of passion and prejudice, by applying their own subjective view of whether a defendant was "really mean" as opposed to "really stupid." *TXO Production Corp.* v. *Alliance Resources Corp.*, 419 S.E.2d 870, 888 (W.Va), *cert. granted*, ___ U.S. ___, 113 S. Ct. 594 (1992).[3/]

3/ For example, under the *TXO* standard, a jury would be instructed that if the jury found the defendant's conduct to be merely "really stupid," it could impose punitive damages in a roughly 5:1 ratio, but that if it found the defendant's conduct to be "really mean" no such limitation applied and that even a many hundredfold disparity could be acceptable. *TXO Production Corp.* v. *Alliance Resources Corp.*, 419 S.E.2d at 889.

Though the West Virginia Supreme Court of Appeal here stated that "the punitive damages awarded in this case were not so unreasonable as to demonstrate such passion and prejudice that a new trial is warranted," *id.* at 890, this finding is clearly anchored in the court's superficial and suspect categorization permitting imposition of significantly larger punitive damage awards on "really mean" as opposed to "really stupid" defendants. The court in its discussion of passion and prejudice addressed only the single issue that the punitive damages bore a reasonable relationship to the purported net worth of the defendant, *id.*, and not whether the punitive damages bore a reasonable relationship to the acts committed or to compensatory damages. It is clear from the court's opinion that the only reason the court found the 526:1 ratio of punitive to compensatory damages to comport with due process was

(continued...)

This Court long ago made clear that a jury award which is the product of passion or prejudice must be reversed and remanded for a new trial on all issues:

> [N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

Minneapolis, St. Paul & S.S.M. Ry. Co. v. *Moquin*, 283 U.S. 520, 521-22 (1931).

In *Moquin*, the state Supreme Court found that a jury's damage award was the result of passion and prejudice, *Moquin*, 181 Minn. 56, 64, 231 N.W. 829, 833 (Minn. 1930), *rev'd*, 283 U.S. 520 (1931), but refused to reverse the jury's finding of liability, as "[t]he evidence is sufficient to sustain these findings." The state Supreme Court in *Moquin* thus did not order a new trial, but simply reduced the damages if plaintiff would agree to a remittitur, which plaintiff did. *Id.* at 59-60, 231 N.W. at 831. This Court reversed, holding that, once it was determined that juror passion and prejudice affected the jury's verdict, a court will not be permitted to speculate as to which parts of the verdict may have been untainted. *Moquin*, 283 U.S. at 521-22.

Thus, under *Moquin*, *no* verdict based "in any degree" upon jury passion and prejudice may stand. For example, in

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3/(...continued)
because of the court's categorization of the defendant as "really mean."

Simeon v. *T. Smith & Son, Inc.*, 852 F.2d 1421, 1426 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989), the Fifth Circuit stated that "[w]hile mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudice . . . may not be so cured. A new trial must be ordered when the verdict results from passion and prejudice." The Eighth Circuit similarly stated that "[r]emittitur is not proper if the verdict is the result of passion or prejudice because passion or prejudice may affect the decision of the jury on the issue of liability as well as damages." *Everett* v. *S.H. Parks & Associates, Inc.*, 697 F.2d 250, 253 & n.5 (8th Cir. 1983).4/

4/ *See also Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (citing *Moquin* for the "general rule that a verdict based on jury prejudice cannot be sustained *even when* punitive damages are warranted") (emphasis added); *Malandris* v. *Merrill Lynch*, 703 F.2d 1152, 1168 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983); *Wells* v. *Dallas Independent School District*, 793 F.2d at 683-84 (when a verdict results from prejudice and passion, remittitur is improper and a new trial is required to obtain a verdict that is not unduly influenced); *Westbrook* v. *General Tire & Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985) (same); *Edwards* v. *Sears-Roebuck & Co.*, 512 F.2d 276, 281-83 (5th Cir. 1975) (same); 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2815, at 103 (1973) ("[R]emittiturs . . . are not proper if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability, as well as on damages. In those instances a complete new trial is required."); 6A *Moore's Federal Practice*, ¶ 59.08[7], pp. 59-197, 59-198 (1992) ("If the verdict is the result of passion or prejudice . . . the trial court *must* unconditionally order a new trial and cannot give the plaintiff the option to accept a lesser amount") (emphasis in original).

The rule is different in cases which involve merely excessive damages, in which remittiturs may be proper. *See, e.g., Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966); *Sabella* v. *Southern Pacific Co.*, 70 Cal. 2d 311, 74 Cal. Rptr. 534, 449 P.2d 750, *cert. denied*, 395 U.S. 960 (1969).

In *Haslip*, this Court recently reiterated its adherence to the principle enunciated in *Moquin*, grounding it explicitly in due process. The Court stated that "due process imposes some limits on jury awards of punitive damages, and *it is not disputed that a jury award may not be upheld if it was the product of bias or passion*, or if it was reached in proceedings lacking the basic elements of fundamental fairness." 111 S. Ct. at 1038 (emphasis added), *quoting Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989). Similarly, Justice Kennedy emphasized in his concurring opinion that "*[a] verdict* returned by a biased or prejudiced jury *no doubt* violates due process. . . ." *Id.* at 1055 (Kennedy, J., concurring) (emphasis added).

In spite of the fact that this Court has made clear that a new trial on all issues is required where verdicts are infected by passion or prejudice, *see Haslip*, 111 S. Ct. at 1038, 1055; *Browning-Ferris*, 492 U.S. at 276; *Curtis Publishing Co.* v. *Butts*, 388 U.S. at 160; *Moquin*, 283 U.S. at 521-22; numerous federal and state courts have either failed to follow the *Moquin* doctrine or have explicitly rejected it. For example, the California court hearing the appeal of *Amicus* herein, on remand from this Court, explicitly stated that "*Moquin* was not announcing a rule of federal due process" and thus "*Moquin* is in no sense binding on this or any other California court." *Wollersheim* v. *Church of Scientology of California*, 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532, 546 (Cal. App.), *review granted*, 10 Cal. Rptr. 2d 182, 832 P.2d 898 (Cal. 1992) (after finding passion and prejudice, court refused to reverse the jury award of $5 million compensatory damages and $25 million punitive damages, and instead reduced the award to $500,000 compensatory and $2,500,000 punitive damages). In reading *Moquin* so narrowly, the California court utterly ignored this Court's more recent broad statements in *Browning-Ferris* and

Haslip, as well as the numerous decisions applying the *Moquin* principle broadly.

In addition, other courts, though not explicitly rejecting *Moquin*, have failed to vacate passion and prejudice infected awards and instead have simply reduced them, without any analysis of the propriety of doing so under due process. These courts often have stated only that the reduction is "to do justice," or a similar formulation, without any discussion of how the court determined that an unprejudiced jury would have found liability on the part of the defendant or awarded the reduced amount. *See, e.g., Las Palmas Associates* v. *Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301, 322 (Cal. App. 1991) ($10 million punitive damage award reduced, as "any amount higher than $2 million would be the result of passion and prejudice"); *Little* v. *Stuyvesant Life Ins. Co.*, 67 Cal. App. 3d 451, 470, 136 Cal. Rptr. 653, 664 (Cal. App. 1977) (jury award infected by passion and prejudice; "justice will be best served" by reducing punitive damage award, rather than vacating it, without further explanation); *Allard* v. *Church of Scientology of California*, 58 Cal. App. 3d 439, 452-53, 129 Cal. Rptr. 797, 805-06 (Cal. App. 1976), *cert. denied*, 429 U.S. 1091 (1977) (same); *Rosener* v. *Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 753, 168 Cal. Rptr. 237, 245 (Cal. App. 1980), *app. dism'd*, 450 U.S. 1051 (1981) (same; "modify . . . to do justice"); *Goshgarian* v. *George*, 161 Cal. App. 3d 1214, 1230, 208 Cal. Rptr. 321, 331-32 (Cal. App. 1984) (same); *cf. Auster Oil & Gas, Inc.* v. *Stream*, 835 F.2d at 604 n. 6 (court held passion and prejudice infected only punitive damages and thus ordered new trial only on that issue; no discussion of standards applied, except to state "from our review of the record"); *The Post Office* v. *Portec, Inc.*, 913 F.2d 802, 811 & n. 3 (10th Cir. 1990) (court found punitive damage award caused by passion and prejudice and ordered a remittitur of punitive damages only; sole discussion as to liability and compensatory

damages was that "[w]e do not, however, conclude that the original liability determination was tainted"), *vacated as moot*, 935 F.2d 1105 (10th Cir. 1991).[5/]

The lack of explicit reasoning in these cases makes clear that, where a punitive damage award is the result of jury passion and prejudice, a disturbing number of state and federal courts have rejected, ignored or rendered meaningless this Court's *Moquin* decision, and have developed no meaningful standards to guide them in determining whether to modify the punitive damage award, to vacate the punitive damage award, or to vacate the judgment entirely.

Once a court has found that a punitive damage award is based on passion and prejudice, it is obviously improper for the court to aggregate to itself the jury's determination of whether to impose, or the amount of, punitive damages. A court certainly could not presume that a dispassionate jury would have imposed any punitive damages, because the determination whether to impose punitive damages at all is a matter wholly within the discretion of the jury and a court cannot direct the award of punitive damages. McCormick, *Damages* § 84, p. 296 (1935) ("jury . . . has entire discretion to refrain from giving any punitive damages at all even though all the elements of malicious and damaging misconduct may have been fully established"); *Brewer* v. *Second Baptist Church*, 32 Cal. 2d 791, 800-01, 197 P.2d 713 (Cal. 1948); *Haines* v. *Parra*, 193 Cal. App. 3d 1553, 1560, 239 Cal. Rptr. 178, 182 (Cal. App. 1987); B. Witkin, *Summary of California Law* § 1373, at 840 (9th ed. 1988); *cf.*, *Shu-Tao Lin* v. *McDonnell Douglas Corp*, 742 F.2d 45, 50 (2d Cir. 1984) (where prejudicial error has infected jury's

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5/ In contrast some courts adhere to the *Moquin* principle. *See, e.g., Hale* v. *Firestone Tire & Rubber Co.*, 820 F.2d 928, 936 (8th Cir. 1987).

entire consideration of compensatory damages, remittitur is improper as it "disregards the jury's verdict entirely and deprives the defendants of their right to trial by jury").[6/]

In fact, those courts which have ordered a reduction of punitive damages in passion and prejudice cases are engaging in mere speculation as to what damages an unprejudiced jury would have imposed, or even that it would have found for plaintiff. As the Fifth Circuit stated, when an award based upon passion and prejudice is reduced significantly,

> we find it difficult to regard the . . . remnant of [the] verdict as in any sense a product of the jury. It was the judge's verdict; a new trial is called for.

Wells v. *Dallas Independent School District*, 793 F.2d at 684 (5th Cir. 1986). "Sound public policy should preclude awards based on mere speculation. . . . There is no reason for a different standard for punitive damages." *Adams* v. *Murakami*, 54 Cal. 3d 105, 114, 284 Cal. Rptr. 318, 323-24, 813 P.2d 1348 (Cal. 1991).

Certainly, there may be some narrow exceptions to the principle enunciated in *Moquin* requiring a new trial on all issues when a verdict is based on passion and prejudice. For example, even when the verdict may have been the result of

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6/ Judicial speculation as to what an unprejudiced jury *might* have done is particularly inappropriate in cases involving unconventional groups, such as a minority religion, where heightened judicial protection is required. The Supreme Court has repeatedly warned against the dangers of hostile, impassioned juries imposing massive damages against unconventional groups and viewpoints, *see, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988), and the history of public opprobrium against new, minority religions, *see Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947), regrettably continues to this day.

passion or prejudice, a complete new trial on liability should not be required where liability is conceded or where the facts going to liability would have *required* summary judgment or a directed verdict. *See, e.g., Westbrook* v. *General Tire & Rubber Co.*, 754 F.2d at 1241-42 (where prejudicial error was directed only to damages, new trial ordered limited solely to damages); *Edwards* v. *Sears-Roebuck & Co.*, 512 F.2d at 282-83. Obviously in such situations where any non-inflamed jury would have had no choice but to find liability, the *Moquin* rationale would not apply, as the verdict on liability clearly would *not* be affected by passion and prejudice. In such an exceptional situation, it would be proper to remand for a new trial solely on compensatory and punitive damages.[7/] However, in light of the fact that the award of punitive damages is wholly within the discretion of the jury, under *Moquin* and its progeny a new trial on punitive damages is always required in verdicts based on passion and prejudice.

CONCLUSION

Amicus urges the Court to hold that due process mandates that when a punitive damage award is found to be the result of passion or prejudice, a new trial on both liability and damages ordinarily is required. *Amicus* further urges the Court to

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7/ Moreover, in a situation where liability is indisputable, and in addition the compensatory damages which flow from liability are a mere matter of calculation, *e.g.*, a claim where the damages can be established as a matter of law, there would be no need for a new trial on compensatory damages. 6A *Moore's Federal Practice* ¶ 59.08[7] at pp. 59-199, 59-201 (1992). In such a case, a new trial would be required only on punitive damages.

articulate clear standards for reviewing courts to utilize in determining whether to reverse such verdicts either in their entirety or in part, or to reduce the punitive damages.

Dated: New York, New York
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Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

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v.

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Respondents.

On Writ of Certiorari
To The Supreme Court of Appeals
of West Virginia

BRIEF *AMICI CURIAE* OF PHILLIPS PETROLEUM CO., UNITED SERVICES AUTOMOBILE ASSOCIATION, AND ALLSTATE INSURANCE CO. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici shall address the following questions:

1. Whether the Due Process Clause of the Fourteenth Amendment imposes special obligations on the judiciary to supervise the imposition of punitive damages because the common law punitive damage system is a judicially created public-wrong punishment mechanism that functions largely without any meaningful or adequate guidance by the legislative or executive branches of government.

2. Whether the courts have failed faithfully to adhere to the due process principles articulated by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991).

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BRIEF *AMICI CURIAE* OF PHILLIPS PETROLEUM CO., UNITED SERVICES AUTOMOBILE ASSOCIATION, AND ALLSTATE INSURANCE CO. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*•

Amici respectfully submit this brief in support of petitioner to assist the Court in analyzing the due process issues raised in this case. The purpose of this brief is twofold: First, to address the jurisprudential underpinnings of *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991); and second, to expose the haphazard and capricious manner in which *Haslip* has been implemented.

•Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Amici have experienced first-hand the pernicious effects of punitive damage systems unchecked by the due process safeguards approved by this Court in *Haslip*.

Phillips Petroleum Company has asked for rehearing and rehearing *en banc* in *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 979 F.2d 1301 (8th Cir. 1992). In that case, the Eighth Circuit, applying Arkansas law, upheld two separate punitive damage awards against Phillips—$4,000,000 for tortious interference with a business relationship and $4,000,000 for fraud—for its refusal to fulfill a gratuitous promise resulting in a "single compensatory injury" of $750,000 to the plaintiff. The court rejected Phillips' Due Process Clause challenges to the Arkansas punitive damage system and the dual $4,000,000 punishments, upholding the Arkansas punitive damage jury instruction as "comparable" to that approved in *Haslip* and finding that Arkansas' "shock the conscience" standard of judicial review was constitutional. *Id.*, at 1302, 1306. But the punitive damage jury instruction in *Robertson* allowed a "standardless approach . . . coupled with consideration of an improper element (wealth of the defendant)," *id.*, at 1313 (Beam, J., dissenting), that "falls well short of the constitutional requirements outlined in *Haslip*." *Id.* Accordingly, the jury was allowed "to 'run wild' and no amount of post-trial judicial review can correct the error." *Id.*

Allstate Insurance Company is currently appealing a $2,000,000 punitive damage judgment in the Tenth Circuit. *See Capstick* v. *Allstate Ins. Co.*, No. CIV-90-284-5 (E.D. Okl. Mar. 26, 1991), *amended* (E.D. Okl. June 11, 1991), *appeal docketed*, No. 91-7088 (10th Cir. June 28, 1991). Punitive damages were awarded based upon Allstate's alleged "bad faith" in handling a claim for coverage of a $3,000 automobile fire loss involving circumstances in which an act of arson by the automobile's owner was suspected. The punitive damages imposed are 666 times greater than the amount of compensatory damages.

United Services Automobile Association ("USAA") was recently assessed with a $2,594,446 punitive damage award

by a California jury in an insurance bad faith case despite the fact that its insured *stipulated at trial* that USAA's insurance claim adjustment was reasonable, prompt and thorough. *Kyle* v. *United Services Auto. Ass'n*, No. 323725 (San Mateo Superior Court May 5, 1992), *appeal docketed*, No. A057408 (Cal. Ct. App.). USAA was punished solely on the basis of allegations that it should not have asserted a tenable legal defense to liability under the insurance contract, an increasingly popular punitive damage theory, similar to the one invoked here to punish TXO, that not only raises serious due process concerns but also implicates the First Amendment right of access to the courts. Indeed, in 1989, the Alabama Supreme Court assessed USAA with a $2,500,000 punishment for filing a declaratory judgment action "seeking a determination of its nonliability under a homeowner's insurance policy . . . ." *United Services Auto. Ass'n* v. *Wade*, 544 So. 2d 906, 907 (Ala. 1989).

Amici believe that their recent experiences with the punitive damage system make them especially well suited to assist the Court in addressing the important issues presented by this case.

SUMMARY OF ARGUMENT

Punitive damages require particularly rigorous judicial scrutiny because they are government punishments imposed for perceived public wrongs without the participation and protections of the legislative and executive branches of government. Punitive damages are not "damages" in the traditional sense because they do not serve and are not limited by the compensation function. Rather, punitive damages are closely analogous to criminal punishment because they are exacted by the state to punish and deter anti-social conduct. Unlike criminal punishments, however, punitive damage systems (1) generally lack legislatively prescribed standards and punishment levels; (2) employ self-interested private prosecutors, rather than disinterested executive branch officials, to act in the name of "the *public* interest," *Adams* v. *Murakami*, 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348, 1358 (1991) (emphasis in

original), unconstrained by public prosecutorial standards; and (3) typically involve little or uneven and unpredictable judicial supervision.

As a result of theoretical confusion in the 19th century law of torts and compensatory damages, the punitive damage system developed without any legislatively determined standards or limits. It therefore operates without many of the most vital protections from arbitrary government action: laws of general application, clearly and intelligibly written, that give advance notice of the conduct that will warrant punishment and that establish express limits on the extent of the punishment that may be inflicted for deviation from those standards.

The executive branch, and its customary limiting role in the application of state-imposed punishments, is also absent. Thus, punishment is inflicted without the restraining influence of executive officials charged with responsibility for fair, consistent, uniform and non-vindictive enforcement of the public's laws under public standards for the public welfare and accountability to the public through democratic processes. Rather, punitive damages are administered by unaccountable private individuals with a financial stake in the outcome of the prosecution, so that every case is motivated by a desire to inflict the severest form of punishment.

Having created a punishment system without the involvement of the other branches of government, the judiciary has allowed it to run wild. The courts generally defer to unsupervised juries that are permitted to assess punishments almost exclusively on the basis of prejudicial factors such as the defendant's wealth, refusing to set aside all but the most subjectively "shocking" awards.

Due process does not exist where States impose punishment without any participation by two of the three branches of government and idle and inconsistent oversight by the third. The Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), implicitly recognized that the concentration of legislative, executive

and judicial power in private prosecutors and in *ad hoc*, unfettered juries is dangerous, unless the judiciary applies exceedingly vigilant standards and strict controls to ensure rationality, fairness and predictability in the system.

However, the vast majority of courts have largely ignored the due process principles articulated in *Haslip*. The punitive damage system, which has produced nearly one-half *billion* dollars of punishment since *Haslip* was decided, remains literally out of control.

ARGUMENT

A. Due Process Requires that the Judiciary Carefully Scrutinize and Consistently Supervise Punitive Damages Because of the Absence of Legislative and Executive Participation

1. The Common Law Punitive Damage System Lacks Adequate Legislative, Executive and Judicial Branch Controls

Punitive damages are state-imposed, " 'quasi-criminal' "[1] punishments for public, as distinguished from private, wrongs.[2] They serve the exact same purposes as the criminal law—"retribution and deterrence." *Haslip*, 111 S. Ct., at 1044. Although the penalty is paid to a civil litigant rather than the State, it is nevertheless a state-directed punishment for deviation from a societal standard. The term "damages," which implies a remedial function, is therefore a misnomer because compensation for injuries plays no part in the punitive damage function. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981).

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[1] *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

[2] Blackstone divided wrongs into two species: (1) private wrongs that invaded private rights and were redressed by private remedies, primarily compensatory damages; and (2) public wrongs that involved breaches of broad public standards of conduct and were sanctioned through the medium of public remedies such as fines. *See* 3 W. Blackstone, *Commentaries* 2 (1768).

Despite their affinity to criminal fines,[3] punitive damages have generally not been subject to any of the controls of the legislative, executive and judicial branches that protect defendants from arbitrary, capricious and disproportionate punishments in criminal cases. The " 'touchstone of due process is protection of the individual against arbitrary action of government.' " *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (quoting *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)). In our system of government, " 'the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; [and] are obliged to follow reason instead of being free to follow caprice.' " *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 101 (4th Cir. 1991) (quoting R. Pound, *The Spirit of the Common Law* 183 (Beacon Press ed. 1963)). In criminal cases, arbitrary and capricious action is checked to a significant degree by the division of the power over criminal punishment among the three branches of government. The legislative branch has the responsibility prospectively to define proscribed conduct and punishment. The executive branch has the duty to serve as the "disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered." *Young* v. *United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815 (1987) (Blackmun, J., concurring). And the judicial branch imposes and administers a panoply of procedural safeguards to ensure that criminal defendants are treated fairly.

[3] Although the Court in *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages, it has often characterized punitive damage awards as "fines," because of their indisputably penal nature. *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("private fines levied by civil juries"); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 259, 269 (1984) (Blackmun, J., dissenting) (punitive damage award was a "jury fine"; trial court instructed the "jury to fashion a fine"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (punitive damages "serve the same function as criminal penalties and are in effect private fines"); *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting) (characterizing punitive damage award as a " 'fine' . . . [which] should go to the State").

As shown below, these important institutional controls over punishment by "arbitrary will" are almost completely lacking in the common law punitive damage system.

a. Lack of Legislative Standards

i. *Standards of Liability*

Criminal fines, like other criminal punishment, may not be imposed for public wrongs unless the proscribed conduct is defined clearly and explicitly in *advance* by the legislature. *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). That is because one of the "basic purposes" of the Due Process Clause of the Fourteenth Amendment has

> always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

Giaccio v. *Pennsylvania*, 382 U.S. 399, 403 (1966).[4]

Punitive damages for public wrongs, however, are inflicted based upon "ill-defined" standards, *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4 (1985) (Brennan, J., dissenting), and constantly evolving common law tort theories that arise *ad hoc* from court decisions, often *after* the conduct for which the punishment is imposed. *See, e.g., Peterson* v. *Superior Court*, 31 Cal.

[4] As of the time of the ratification of the Fourteenth Amendment, nearly every state legislature had enacted a comprehensive criminal code that defined punishable crimes and fixed maximum punishments. (A compendium of those codes is reprinted in App. A, *infra*.) At the federal level, this Court rejected early the concept of common law crimes, holding that prior to prosecution of a federal offense, Congress "must first make an act a crime [and] affix a punishment to it . . . ." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 31, 34 (1812).

3d 147, 181 Cal. Rptr. 784, 642 P.2d 1305 (1982) (holding that new tort rule allowing punitive damages for drunk driving would be applied retroactively). In many punitive damage cases, the standard of liability is like "a predator lurking in the shadows to pounce on the unsuspecting." *Eichenseer* v. *Reserve Life Ins. Co.*, 894 F.2d 1414, 1420 (5th Cir. 1990) (Jones, J., dissenting from denial of rehearing *en banc*); *see also Mattison*, 947 F.2d, at 105-06 (vague standards of liability for punitive damages coupled with unlimited nature of punishment make punitive damages "the product of the subjective feelings of a particular jury in a particular courtroom applying what they think 'the law should be instead of what it is' ") (quoting *Giaccio*, 382 U.S., at 403).

This case is a perfect example of the "vagueness . . . problems," *Browning-Ferris*, 492 U.S., at 283 (O'Connor, J., concurring and dissenting), that inhere in the system. The West Virginia Supreme Court acknowledged that "there is no West Virginia case on record directly recognizing an action for slander of title," *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870, 877, *cert. granted*, 113 S. Ct. 594 (1992). Nonetheless, the court was not deterred from announcing for the first time that this tort existed in West Virginia, delineating the elements of that newly recognized tort, and upholding a $10,000,000 retroactive punishment against petitioner based upon its commission.[5]

[5] The court recognized an action for slander of title based upon a provision in the state constitution stating that " 'the common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same.' " 419 S.E.2d, at 877-78 (quoting W. Va. Code § 2-1-1). Relying exclusively on English court decisions from the 16th and 17th centuries, the court held "that an action for slander of title could always be brought in West Virginia." *Id.*, at 879. However, the court was obliged to turn to contemporary non-West Virginian authorities to define the elements of the tort. *See id.*

ii. *Standards Governing the Amount of the Punishment*

The amount of the punishment that may be imposed for criminal wrongs also is articulated by the legislature in statutes that specify finite, ascertainable limits. That is because "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U.S. 386, 393 (1958). Indeed, the principle that limits on criminal punishment must be clearly prescribed by the legislature, and its corollary that judges and juries may not set such limits *sua sponte* on an *ad hoc* basis, have been recognized by the States since early in our Nation's history and were well established by the time the Fourteenth Amendment was ratified. *See supra* note 4 & *infra* App. A. As illustrated by the Court's unanimous decision in *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court has assumed, at least since its decision in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), that no person can be punished for the commission of an offense deemed "criminal" unless an upper limit on the punishment has been announced prior to the commission of the acts leading to conviction. Thus, in "the early days of the Republic . . . [e]ach crime had its defined punishment." *United States* v. *Grayson*, 438 U.S. 41, 45 (1978). Although the " 'excessive rigidity of the [mandatory or fixed sentence] system' " eventually gave way to a somewhat more flexible system that permitted the sentencing authority "to select a sentence within a *range* defined by the legislature," *id.*, at 46 (emphasis in original) (citations omitted),[6] even under the "indeterminate sentenc[ing]" model adopted in some jurisdictions, the legislature "defined the maximum [and] the judge imposed a sentence within the statutory range." *Mistretta*, 488 U.S., at 365; *Grayson*, 438 U.S., at 47.[7]

[6] *See also Mistretta* v. *United States*, 488 U.S. 361, 364 (1989) (although "Congress early abandoned fixed-sentence rigidity [it] . . . put in place a system of ranges within which the sentencer could choose the precise punishment").

[7] The Sentencing Reform Act, 28 U.S.C. § 991(b)(1), was enacted, in

However, "[u]nlike criminal penalties, . . . punitive damages are not awarded within discernible limits." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). Punitive damages are assessed and spontaneously imposed by juries randomly selected for a single case with little more guidance than a vague and general admonition to consider the primary goal of deterrence and the secondary goal of retribution. But juries cannot be expected to evaluate punishment levels based upon consideration of society's priorities and standards that legislatures consider when they establish criminal penalties. Thus, individual juries establish their own punishment regime without the tools, information, competence, experience or leavening features of the legislative process, and without the limiting restraint of the compensation function. *See Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting) (contrasting "finite" nature of compensatory damages with unlimited nature of punitive damages); *cf. Hicks* v. *Feiock*, 485 U.S. 624, 627 (1988) (O'Connor, J., dissenting).[8] Yet the *ad hoc* jury punishment selected in a particular case usually dwarfs the maximum criminal punishments for comparable or even more egregious public wrongs. *See Silkwood*, 464 U.S., at 263 (Blackmun, J., dissenting); *id.*, at 283 & n.13 (Powell, J., dissenting).[9]

relevant part, in response to the problems of uncertainty and inconsistency in sentencing resulting from the "unfettered discretion" conferred upon sentencing judges to impose punishment "within the statutory range fixed by Congress." *Mistretta*, 488 U.S., at 365; S. Rep. No. 225, 98th Cong., 1st Sess. 38-40 (1983). It is more than ironic that civil juries empowered to impose punitive damages possess vastly broader discretion than the "unfettered discretion" conferred upon sentencing judges that Congress sought to eliminate by a more determinate sentencing process.

[8] The retributive and deterrent purposes that justify punishment themselves "possess inadequate self-limiting principles," *Tison* v. *Arizona*, 481 U.S. 137, 180 (1987) (Brennan, J., dissenting), and therefore do not operate as any meaningful restraint on jury discretion when the legislature has not made a considered judgment regarding society's collective views about the egregiousness of certain conduct and its desire to punish and deter it.

That the punitive damage system operates in this fashion is primarily an historical accident. "Although punitive damages have long been recognized, the early reasons given for their award were uncertain . . . ." *Mattison*, 947 F.2d, at 103 (discussing historical evolution). As in England,[10] early punitive damage cases in this country confused the rationale for imposing "exemplary" damages, deeming them compensation for "intangible injuries" or ascribing dual compensatory and punitive justifications to jury awards that apparently exceeded the amount necessary to compensate for actual tangible injury. *See, e.g., McNamara* v. *King*, 7 Ill. (2 Gilm.) 432, 436 (1845). As the concept of actual damages expanded to include compensation for intangible injuries such as mental anguish, there was "nothing left for 'exemplary damages,' as formerly understood, to operate upon" and punitive damages generally came to be understood to refer to "punishment for the sake of public example . . . ." *Fay* v. *Parker*, 53 N.H. 342, 384 (1872). Because punitive damages were the product of the evolving common law tort compensation system, these monetary punishments imposed in ostensibly civil proceedings were, unlike monetary punishments imposed in criminal proceedings, left to the virtually unlimited, and rarely disturbed, discretion of the jury.

The anomaly of having statutorily limited monetary punishments in criminal cases and unlimited monetary punishments in punitive damage cases has gone unremedied but not unnoticed. A commentator observed in 1912 that

[9] For example, in this case, TXO's alleged slander of title in its efforts to obtain oil and mineral rights was punished by the award of $10,000,000 in punitive damages. The fines imposed by West Virginia criminal law for comparable conduct are miniscule in comparison. *See, e.g.*, W. Va. Code § 61-3-24a (criminal fine of no more than $300 may be imposed on person who obtains or attempts to obtain property by "false or fraudulent means").

[10] *See, e.g., Tullidge* v. *Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769).

"[it] certainly appears to be an incongruity that one may be punished by the public for [a] crime . . . by a fine limited by statute, and again punished in favor of the sufferer . . . for the same act, by exemplary damages, with little limit on the discretion of the jury." W. Hale, *Handbook On The Law Of Damages* §§ 87-88, at 306 (2d ed. 1912). The full impact of this limitless punishment regime on the civil justice system, however, was not felt until much later. As long as punitive damage awards were relatively rare and modest in amount, the system tolerated occasional aberrations. But the aberrations are now becoming the standard. *See Browning-Ferris*, 492 U.S., at 282 (O'Connor, J., concurring and dissenting); *see also Molzof* v. *United States*, 112 S. Ct. 711, 715 (1992); *Mattison*, 947 F.2d, at 103-04. In the last two decades, particularly, the doctrine metamorphasized from an infrequent anomaly designed to make a defendant "smart"[11] into a full-fledged punishment scheme that permits juries to punish so severely as literally to destroy a defendant. *See Central Alabama Electric Cooperative* v. *Tapley*, 546 So. 2d 371, 377 (Ala. 1989).

b. Lack of Executive Branch Enforcement

Public wrongs are customarily redressed through the efforts of public officials, constrained by public prosecutorial standards and governmental accountability, and precluded by law from having any personal stake in the punishments imposed.

Although early in our Nation's history, States followed the English system of permitting private prosecutors in criminal cases, since the beginning of the 19th century, most States have been "firmly committed to the concept of official public prosecution." Note, *The Outmoded Concept of Private Prosecution*, 25 Amer. U.L. Rev. 754, 763 (1976); *cf. Young*, 481 U.S., at 808 & n.10 (noting that most States have acknowledged the principle of a disinterested prosecutor). And in those few States that permit private prosecution of certain criminal offenses, restrictions are

[11] *See Fay* v. *Parker*, 53 N.H., at 354.

imposed that guarantee the due process safeguard of a disinterested prosecutor under the control of the executive branch.[12]

The punitive damage system, on the other hand, is driven exclusively by prosecutors who, by definition, have a private interest in the outcome of the litigation and are unfettered by executive branch duties and responsibilities or by the accountability imposed by the democratic process. These private litigants have no responsibility to the public and have a direct, material and purely personal interest in inflicting the greatest possible punishment in every case. *See Smith* v. *Wade*, 461 U.S., at 58 (Rehnquist, J., dissenting) (windfall punitive damage "bounty" is reward for private prosecutors). As has been observed, "[a] person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1178 (1931). The legitimacy of such private bounty hunters is itself open to serious question. *Cf. Young*, 481 U.S., at 787; *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980).

"Vindicating the *public* interest . . . is the function of Congress and the Chief Executive," *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992) (emphasis in original), or at the state level, the legislative and executive branches. By contrast private plaintiffs seek punitive damages not to vindicate the public interest, but rather to further their own private interests—to obtain a "windfall" and a "boon" for themselves. *Adams* v. *Murakami*, 813 P.2d, at 1357-58.

[12] In these States, the private prosecutor is under the control of the district attorney's office and may participate in criminal proceedings only with that officer's permission. Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141, 1153 & n.51 (1986). In addition, private prosecutors are forbidden from representing a plaintiff in civil litigation related to the criminal prosecution. *Id.*, at 1154 & n.54.

c. Lack of Judicial Control

Whereas the judge, not the jury, typically determines the appropriate punishment in the criminal system within the statutory limits established by the legislature,[13] common law courts not only allow juries to calculate punitive damage awards in the first instance but indeed defer almost completely to jury determinations regarding the size of the award. "[J]uries are left largely to themselves," *Browning-Ferris*, 492 U.S., at 281 (Brennan, J., concurring), and possess "discretion to award *any* amount of punitive damages." *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77-78 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). Unless the award may be said to be so outrageous that it, for example, "shock[s] the conscience of the court," *O'Neal Ford, Inc.* v. *Davie*, 770 S.W.2d 656, 659 (Ark. 1980), the level of punishment is whatever unpredictable, uneven and wildly capricious award the jury may select. *See International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 50 (1979) ("the impact of these windfall recoveries is unpredictable and potentially substantial"); *Rosenbloom*, 403 U.S., at 82-83 (Marshall, J., dissenting) (the "essence" of punitive damages is "unpredictability and uncertainty").

Moreover, in criminal cases, public wrongs are redressed through a judicial process that insulates defendants to the greatest extent possible from prejudice based on race, status, domicile, social standing, or wealth. *Powell* v. *Texas*, 392 U.S. 514, 543 (1968) ("Punishment for a status is particularly obnoxious."). The opposite is true in the private punitive damage system. Punitive damages are "employed to punish unpopular defendants." *International Bhd. of Elec. Workers*, 442 U.S., at 50-51 n.14. The system is animated by precisely the prejudicial factors that have been forbidden in the criminal context, and courts do very little to prevent prejudicial, emotional appeals from dominating the punitive damage process. Juries are even instructed to punish according to the depths of the defendant's pocket,

[13] *See, e.g., Mistretta*, 488 U.S., at 365-67; Cal. Penal Code § 1170.

see, e.g., California Book of Approved Jury Instructions 14.71, and its "social condition and standing," *Holmes* v. *Hollingsworth*, 352 S.W.2d 96, 99 (Ark. 1961). Fines are therefore calculated according to sympathy for the plaintiff, hostility toward the defendant, and the irresistible invitation to fill out a blank check with a large number against a corporate bank account.

The criminal defendant also is afforded numerous procedural rights not available to the punitive damage defendant. *See Smith* v. *Wade*, 461 U.S., at 61 (Rehnquist, J., dissenting). For example, a criminal defendant may be entitled to a specific finding of criminal intent beyond a reasonable doubt by a unanimous jury before he can be fined $500, but the same individual or corporation may be fined $5,000,000 or $50,000,000 for the same conduct in a civil suit with none of these protections.[14]

2. *Haslip* Requires Active Judicial Oversight of Punitive Damages to Counter-Balance the Lack of Legislative and Executive Participation in the System

This Court did not expressly cite the lack of legislative, executive and judicial control over the common law punitive damage system as underpinning its holding in *Haslip*. But the due process principles articulated in that case may be explained on this basis. *Haslip* implicitly recognizes that when the government authorizes punishment for public wrongs in a system devoid of legislative or executive controls, the judiciary bears a heavy responsibility to regulate the judicially created system pursuant to which such

[14] No principled constitutional distinction may be drawn between monetary sanctions that are imposed to punish and deter on the basis of whether such sanctions are labeled "criminal" or "civil" or whether they are assessed in criminal or civil proceedings. It is clear that that "[t]he notion of punishment . . . cuts across the division between the civil and criminal law," *United States* v. *Halper*, 490 U.S. 435, 447-48 (1989), and therefore constitutional restraints on punishment are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio*, 382 U.S., at 402.

punishments are inflicted and to scrutinize the awards the system spawns.

The *Haslip* Court stressed two aspects of the appropriate role of the judiciary in overseeing the punitive damage process. First, the Court noted the importance of instructions to circumscribe the jury's decisionmaking process and the need to shield the jury from considering such highly inflammatory factors such as the defendant's "deep pocket." 111 S. Ct., at 1044-45. Second, the Court emphasized the need for an objective, rigorous, two-level post-verdict process that "*ensures* meaningful and adequate review by the trial court," *id.*, at 1044, (emphasis added), *and* requires appellate review that "makes *certain* that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and deter its repetition." *Id.*, at 1045 (emphasis added).

Haslip thus directs courts to take an active role in constraining jury discretion and scrutinizing awards in order to protect defendants from the arbitrary and disproportionate punishments that are the inherent result of a punishment system operating without any meaningful legislative or executive branch participation.[15]

B. Courts Have Ignored *Haslip* and Evaded This Court's Mandate For Clearly Defined Standards to Govern Jury Decisions, Meaningful Judicial Review of Awards, and Proportionality in Punishment

Although a few courts have applied seriously the *Haslip* standards in reviewing punitive damage awards, most courts have either ignored *Haslip*[16] or have wrongly perceived that decision as a license to affirm all but the most

[15] *See also Browning-Ferris*, 492 U.S., at 281 (Brennan, J., concurring) ("I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.").

[16] One court imposed a $1,000,000 award without even citing *Haslip*. *See Snead* v. *Redland Aggregates Ltd.*, No. A-90-CA-38 (W.D. Tex. May 27, 1992).

extravagant of punitive damage awards.[17] In the federal system alone, in the two years since *Haslip*, appellate courts have affirmed at least $56,866,666.65 in punitive damages. District courts have upheld punitive damage awards totalling $233,575,000, including a securities fraud award of $134,000,000 and a "tortious interference" award of $30,000,000. And state appellate courts have let stand punitive damage jury verdicts of at least $128,779,000.[18]

As discussed below, courts have upheld this staggering collection of punishments in disregard of virtually every precept set forth in *Haslip* for analyzing the constitutionality of punitive damages.

1. Jury Instructions

Courts have interpreted *Haslip* to mean that almost any jury instruction on punitive damages will satisfy due process. For example, the *only* information provided by the Arkansas "model" jury instruction given to the jury in *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 979 F.2d, at 1306, is that punitive damages are imposed to punish and deter and that "[i]n arriving at the amount of punitive damages you may consider the financial condition" of the defendant. *See Arkansas Model Instruction* (AMI) 2217 (Civil 1989). The Eighth Circuit found this instruction "comparable" to the one upheld in *Haslip*, even though it

[17] *See, e.g., Price* v. *Highland Commercial Bank*, 932 F.2d 601, 605 (7th Cir. 1991) (interpreting *Haslip* as "upholding the constitutionality of punitive damages except in limited circumstances inapplicable here"); *Latham Seed Co.* v. *Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1501 (8th Cir. 1992) (conceding that Indiana, Ohio, Michigan, and Iowa have "less stringent procedures for reviewing punitive damage awards" than Alabama, but finding that appellant "err[ed] in construing the Alabama process approved in *Haslip* as setting a minimum standard for acceptable due process in the awarding of punitive damages").

[18] A chart listing post-*Haslip* federal court and state appellate court decisions and judgments of which *amici* are aware that uphold punitive damage awards is included as App. B, *infra*. Although this chart does not include unreported post-*Haslip* state trial court judgments entered on punitive damage verdicts, there are numerous such decisions, and some of the most egregious are discussed herein.

lacked a crucial limiting element contained in the *Haslip* instruction—the admonition to consider " 'the character and degree of the wrong' "—and included a highly prejudicial and inflammatory direction to punish the defendant based on its wealth that was excluded from the *Haslip* instruction. *See* 111 S. Ct., at 1044.

The Fifth Circuit recently upheld as constitutional a terse instruction that only told the jury that "[p]unitive damages are designed to punish the offender and serve as an example to others. Whether or not to award such damages, and the amount thereof, are matters confided to you for decision." *Brown* v. *Petrolite Corp.*, 965 F.2d 38, 50 (5th Cir. 1992).

In *American Employers Insurance* v. *Southern Seeding Service*, 931 F.2d 1453, 1457-58 (11th Cir. 1991), the court validated an instruction informing the jury that the amount of an award was "left to your best judgment and good discretion. There are no rules of thumb under the law for me to give you except, of course, you consider what was done and the purpose of punitive damages."

State courts have taken a similarly detached approach. In *Texas Farmers Insurance Co.* v. *Soriano*, No. 04-90-00222-CV, 1992 WL 350627 (Tex. Ct. App. Nov. 30, 1992), jurors were given the definition of gross negligence and then told that exemplary damages meant "an amount that you may, in your discretion, award as an example to others and as a penalty or by way of punishment." 1992 WL 350627, at *17. The court in *K-Mart Corp.* v. *Pearson on Behalf of Ramos*, 818 S.W.2d 410 (Tex. Ct. App. 1991), gave the same definition and then added, "You may consider K-Mart's net worth in determining what amount, if any, would constitute a penalty to K-Mart." *Id.*, at 874. And in *Wolf* v. *Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. App. 1991), the jury's only instruction on how to determine the size of the punitive damage award was that it " 'may award [plaintiff] an additional amount as punitive damages in such sum as you believe will serve to punish defendant Goodyear and to deter defendant Goodyear and others from like conduct.' " *Id.*, at 874.

Moreover, the courts have paid little heed to *Haslip*'s pointed emphasis on the fact that the Alabama system precluded jury consideration of the defendant's wealth.[19] Some courts, including the court below here, have even gone so far as to permit punishments to be calculated based on the jury's consideration of wealth of the defendant's *parent* corporation. *See, e.g., TXO*, 419 S.E.2d, at 890; *Continental Trend Resources, Inc.* v. *OXY USA, Inc.*, No. CIV-90-1006-A, slip op. at 33-34 (W.D. Okl. Oct. 20, 1992) *appeal docketed*, No. 92-6350 (10th Cir. Oct. 23, 1992) (upholding $30,000,000 punitive damage verdict based on the financial status of the defendant's "giant" parent corporation and its "grandparent corporation," which "is reputed to be one of the Top Ten oil companies in the nation"). Others have affirmed punishments where the jury was instructed to consider the defendant's wealth but no wealth evidence was introduced at all, leaving the jury only to speculate. *See, e.g., Latham Seed Co.*, 978 F.2d, at 1500 (upholding $10,000,000 award). And the courts continue to allow "expert" testimony regarding the wealth of the defendant, *see, e.g., Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342, 1346 (8th Cir. 1991); *TXO*, 419 S.E.2d, at 890, which only serves to drive home to the jury that it is being invited to inflict a punishment against a deep pocket.

Perhaps the most vivid example of the failure of the courts to give content to the general guidance provided by *Haslip*, and of the severe consequences of limitless jury discretion, is *ContiCommodity Services, Inc.* v. *Prescott, Ball & Turben*, H-91-81 (S.D. Tex. Apr. 21, 1992), *appeal docketed*, No. 92-2617 (5th Cir. July 31, 1992). In that securities fraud case, the district court upheld the jury's verdict of $3,375,000 in compensatory damages and *$134,000,000* in punitive damages. Post-trial interviews with

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[19] *See Haslip*, 111 S. Ct., at 1044-45 (observing that "[a]ny evidence of Pacific Mutual's wealth was excluded from trial in accord with Alabama law," that the "fact finder must be guided by more than the defendant's net worth," and that "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket").

the jurors revealed the absolute arbitrariness of the method used to arrive at this astounding punishment. First,

> each member independently came up with an amount that he or she felt would 'serve as punishment and as an example for the good of the public,' as the judge's instructions had put it. The sums, which ranged from hundreds of thousands of dollars to nearly a billion, were then averaged together.

Walker, *How They Arrived at $134 Million*, The American Lawyer, May 1992, at 98. When the averaging method "failed to yield a number the jurors felt they could endorse," they "started over again," adding $24,000,000 in "estimated" attorney's and accountant's fees to a $56,000,000 figure that had been "mentioned at trial" as indirect losses incurred by the plaintiff. Still "uncertain whether the resulting figure would be enough of a punishment," the jurors "doubled the award, and then, at the urging of two jurors who were small businessmen, reduced the figure to $134 million." *Id.* This extraordinary "process," "took no more than a morning," *id.*, and the district court denied the defendant's post-trial motions seeking to set the award aside.

2. Post-Verdict Review

The courts have generally ignored *Haslip*'s mandate for detailed and objective judicial scrutiny of punitive damage awards.

In *MGW, Inc.* v. *Fredricks Development Corp.*, 5 Cal. App. 4th 92, 102-03, 6 Cal. Rptr. 2d 888, *review granted*, 832 P.2d 898 (Cal. 1992), for example, the California Court of Appeal held that trial court review of punitive damage verdicts could be omitted altogether. Moreover, some trial courts that have purported to "review" punishments have not even bothered to cite *Haslip* or engage in any detailed analysis. *E.g., Capstick* v. *Allstate Ins. Co.*, No. CIV-90-284-S (E.D. Okl. Mar. 26, 1991), *amended* (E.D. Okl. June 11, 1991), *appeal docketed*, No. 91-7088 (10th Cir. June 28, 1991). And it took the trial court in *Sprague* v. *Philadelphia Newspapers, Inc.*, No. 3644 (Philadelphia Court of Common Pleas Sept. 8, 1992) (order denying post-trial motions), only a single sentence to deny the defendant publisher's request for a remittitur of $31,500,000 punitive damage award for libel.

Appellate courts also have failed satisfactorily to implement *Haslip*'s requirements regarding post-verdict review. For example, in *Hospital Authority of Gwinnett County* v. *Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991), *cert. denied*, 112 S. Ct. 1175 (1992), the Georgia Supreme Court declined to disturb a punitive damage award even though it acknowledged "that the Alabama post-trial review by both the trial and appellate court [as approved by *Haslip*] is more structured" than is the reviewing process in Georgia. 409 S.E.2d, at 503. The court even questioned the wisdom of some of the Alabama guidelines for post-verdict review that were approved by this Court in *Haslip*, *see id.* ("Of what benefit, then, is scrutiny of those elements by the reviewing courts?"), and concluded that "[p]unitive damages do not survive court scrutiny because they can be accurately measured and adjusted by court imposed guidelines," *id.*, but rather simply because they are "[c]lothed in common-law history and tradition," *id.*, at 504.

In *Robertson*, the Eighth Circuit held that the Arkansas standard, which permits reversal of punitive damage awards only if "the amount shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice," comports with the *Haslip* requirements for judicial review. 979 F.2d, at 1303. Similarly, in *MGW, Inc.*, the court determined that the California standards for reviewing punitive damage awards complied with *Haslip*, even though in California "a punitive damages award will be set aside only when it is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." 5 Cal. App. 4th, at 103 (internal quotation marks omitted).[20]

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[20] A state intermediate appellate court that applies the *Haslip* re-

Even those courts that have remitted punitive damage awards have done so generally with little regard to the *Haslip* post-verdict review requirements. For example, in *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), the Tenth Circuit reduced a punitive damage award from $25,000,000 to $12,500,000, finding simply that this award was "so excessive as to shock our judicial conscience," *id.*, at 1561, but not discussing any of the factors considered in arriving at this decision or explaining how the $12,500,000 remitted award was less shocking or more justifiable than the jury's original verdict.

In fact, because there are no standards for deciding the appropriate punishment, the remittitur process can be utterly irrational and very often amounts to nothing more than picking numbers out of thin air. *See, e.g., State Farm Mut. Auto Ins. Co.* v. *Zubiate*, 808 S.W.2d 590, 605 (Tex. Ct. App. 1991) ("Is the evidence factually sufficient to support the trial court's judgment upholding the jury award of $15 million in punitive damages against Appellant? Our answer is no, but why? *Because it just is.*") (emphasis in original); *Hilgedick* v. *Koehring Fin. Corp.*, 5 Cal. App. 4th 1118, 1122-23, 8 Cal. Rptr. 2d 76 (1992) (trial court reduced initial jury's $730,000 punitive damage award to $0 and ordered retrial; second jury imposed $11,000,000 punishment; second trial court remitted award to $8,000,000; and court of appeal further remitted award to $1,800,000); *Las Palmas Assocs.* v. *Las Palmas Center Assocs.*, 235 Cal. App. 3d 1220, 1255-56, 1 Cal. Rptr. 2d 301 (1991) (reducing $10,000,000 punitive verdict to

quirements may even run the risk of reversal by the state supreme court. For example, in *Hanson* v. *American National Bank & Trust Co.*, No. 91-SC-377-OG, 1992 WL 373057 (Ky. Dec. 17, 1992), the Kentucky Supreme Court reversed the Court of Appeals, which had ordered remittitur or a new trial in the alternative. According to the Kentucky Supreme Court, the intermediate court had overstepped its bounds, substituting its "opinion in the place of the jury's," 1992 WL 373057, at *8.

$2,000,000 because "any amount higher than $2,000,000 would certainly be the result of passion or prejudice").

Courts engage in a post-verdict review process bearing little resemblance to the process approved by this Court in *Haslip*. Awards are affirmed based upon the trial judge's highly subjective notions of what constitutes a good domestic, and sometimes even foreign, policy. For example, one trial court in a tortious interference action arising from a domestic commercial contract dispute recently affirmed an award on the grounds that, *inter alia*, "[the defendant's] conduct incrementally damages the United States in its present struggle to remain a global economic power." *Continental Trend Resources, Inc.*, No. CIV-90-1006-A, slip op. at 26; *cf. Union Mortgage Co.* v. *Barlow*, 595 So. 2d 1335 (Ala.) (affirming $6,001,000 punitive damage award against nationalized Finnish banking corporation), *cert. denied*, 113 S. Ct. 301 (1992).

In the case at bar, the West Virginia Supreme Court found that the *Haslip* requirements for objective post-verdict review—as well as West Virginia's own recently articulated procedure based on *Haslip*—could be jettisoned in favor of an utterly subjective construct for reviewing punitive damage awards based upon whether the case involves "(1) really stupid defendants; (2) really mean defendants; . . . [or] (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." *TXO*, 419 S.E.2d, at 887-88. The court proposed this bizarre test, which it acknowledged to be "difficult" to apply, *see id.*, at 888 n.11, in order to differentiate between cases whose ratio of punitive to compensatory damages it sought to limit to "*roughly* five to one," and those cases whose ratio it considered to be essentially limitless—up to and even greater than 500 to one. *Id.*, at 889 (emphasis in original). As the concurrence observed, however, such a "ridiculous categorization" can offer "no practical guidance to attorneys or judges in analyzing punitive damages cases," *id.*, at 896 (McHugh, C.J. and Miller, J., concurring), and makes a mockery of the judicial process.

3. Proportionality

In *Haslip*, the Court articulated the constitutional principle that punitive damages must bear some rational relationship to the egregiousness of the defendant's conduct and the compensatory damage award. *See, e.g.*, 111 S. Ct., at 1045 (noting that Alabama's procedural safeguards adequately ensured "that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages").[21]

Since *Haslip*, however, courts have paid virtually no attention to the proportionality concerns expressed by this Court. For example, a federal district court in a bench trial inflicted a $1,000,000 punitive damage award based on $2 in nominal damages, for a ratio of 500,000 to one, without even discussing *Haslip* or articulating *any* justification for the size of the punishment. *Snead*, No. A-90-CA-38, slip op. at 17.

In *Jennings* v. *Jensen*, 407 S.E.2d 264 (N.C. App. 1991), the court affirmed a punitive damage award of $300,000 while simultaneously vacating the $200,000 compensatory award on which it was based, thus making the ratio actually infinite.[22] The *Jennings* majority ignored *Haslip* even as the dissent quoted the opinion. *Id.*, at 269 (Greene, J., dissenting) (quoting *Haslip*, 111 S. Ct., at 1045).

Similarly, in *Peoples Bank & Trust Co.* v. *Globe International Publishing Co.*, 978 F.2d 1065 (8th Cir. 1992), the Eighth Circuit found that a $50,000 compensatory damage award in a false light/invasion of privacy case against a publishing company was the product of a jury

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[21] *See also id.*, at 1046 (noting that punitive award, which was "more than 4 times the amount of compensatory damages," was a "wide" disparity and "indeed, may be close to the line .... of constitutional impropriety").

[22] Until recently, wrongful death cases in Alabama also awarded no actual damages, thus making their "ratios" infinite. *See, e.g., Atkins* v. *Lee*, 603 So. 2d 937 (Ala. 1992); *Yamaha Motor Co.* v. *Thornton*, 579 So. 2d 619 (Ala. 1991).

inflamed by passion and prejudice, was "shockingly inflated" and remanded for a "substantial remittitur." *Id.*, at 1071. But the court inexplicably allowed an $850,000 punitive damage award to stand untethered to any compensatory award, even though it recognized that "punitive damages should bear a reasonable relationship to the harm that has occurred." *Id.*

Many courts, while citing *Haslip*, have nonetheless awarded punitive damages vastly in excess of the actual injury inflicted. In at least twelve cases, courts that have purported to follow *Haslip* have nonetheless awarded punitive damages at least 100 times the amount of actual damages awarded.[23] Six of those cases involved ratios of 499:1 or wider. And the Alabama Supreme Court alone has used the license given to it in *Haslip* to affirm awards where the ratio was at least 100:1 on no less than *six* occasions since *Haslip*.

Some courts, despite *Haslip*, continue to assert that there need not be *any* kind of proportionality between the actual damages and the punitive damages awarded. In upholding a $30,000,000 punitive damage award that is 111 times the compensatory award, the court in *Continental Trend Resources, Inc.* stated that " 'Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages.' " Slip op.

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[23] *Principal Fin. Group* v. *Thomas*, 585 So. 2d 816 (Ala.) (750:1), *cert. denied*, 112 S. Ct. 649 (1991); *Capstick*, No. CIV-90-284-5 (E.D. Okl. Mar. 26, 1991) (666:1); *TXO*, 419 S.E.2d 870 (526:1); *Standard Plan, Inc.* v. *Tucker*, 582 So. 2d 1024 (Ala. 1991) (500:1); *Eichenseer*, 934 F.2d 1377 (500:1); *Southern Life & Health Ins. Co.* v. *Turner*, 586 So. 2d 854 (Ala. 1991) (499:1); *Smith* v. *States General Life Ins. Co.*, 592 So. 2d 1021 (Ala. 1992) (416.67:1); *Hospital Auth. of Gwinnett County*, 409 S.E.2d 501 (260:1); *Viking Ins. Co. of Wisconsin* v. *Jester*, 836 S.W.2d 371 (Ark. 1992) (250:1); *Continental Trend Resources, Inc.*, No. Civ. 90-1006-A (W.D. Okl. Oct. 20, 1992) (111.5:1); *Intercontinental Life Ins. Co.* v. *Lindblom*, 598 So. 2d 886 (Ala.) (100:1), *cert. denied*, 113 S. Ct. 200 (1992); *General Motors Corp.* v. *Johnston*, 592 So. 2d 1054 (Ala. 1992) (100:1).

at 41 (quoting *Buzzard* v. *Farmers Ins. Co.*, 824 P.2d 1105, 1115 (Okl. 1991)).[24]

Even more disturbing are the cases remanded for reconsideration by this Court with explicit directions to reevaluate the punitive damage awards in light of *Haslip*. On remand in *Hospital Authority of Gwinnett County* v. *Jones*, the Georgia Supreme Court upheld a 260:1 ratio. The court stated that "[w]hile the Supreme Court in *Haslip* analyzed the punitive damages award by comparing it to the actual award, nothing in the opinion mandates such a comparison. . . . While comparison to the actual damages may be appropriate in one case, it may not in another." 409 S.E.2d, at 503.

In *Southern Life and Health Insurance Co.* v. *Turner*, the Alabama Supreme Court upheld a 499:1 ratio on remand, asserting that it could find "no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages. Imposing such a relationship would inevitably result in injustice, and we decline to impose it." 586 So. 2d, at 858. And in *Eichenseer* v. *Reserve Life Insurance Co.*, the Fifth Circuit, on remand, purported to apply *Haslip*'s precepts but then reaffirmed a 500:1 ratio, concluding that "[p]erhaps in some cases—even in many cases—an award of punitive damages that is five hundred times the amount of the compensatory

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[24] *See also Jordan* v. *Clayton Brokerage Co. of St. Louis, Inc.*, 975 F.2d 539 (8th Cir. 1992) ("punitive damages . . . need not bear any relation to the actual damages allowed."), *petition for cert. filed* (U.S. Dec. 17, 1992) (No. 92-1054); *Robertson*, 979 F.2d, at 1310 ("the loss to Robertson Oil reflected in the compensatory damages interrogatory has no bearing on the punitive damages award"); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225, 1237 (S.D. Iowa 1991) ("There is no set mathematical ratio between actual and exemplary damages."); *Ebeling & Reuss, Ltd.* v. *Swarovski Int'l Trading Corp., A.G.*, No. Civ. A. 88-4878, 1992 WL 211554, at *18 (E.D. Pa. Aug. 24, 1992) ("Pennsylvania law makes clear that punitive damages awards do not have to be related to the compensatory damages suffered."); *General Motors Corp.*, 592 So. 2d, at 1063 ("punitive damages need bear no relationship to actual damages").

damages will violate due process. This is not such a case." 934 F.2d, at 1384.

CONCLUSION

Haslip should have made clear that punishments imposed by courts for public wrongs and paid to private litigants must be rigorously controlled under the Due Process Clause. However, as demonstrated by the "really mean/really stupid" test adopted by the court below and the multitude of other cases upholding "millions of dollars of liability" in a similarly "hodge-podge fashion," *Haslip*, 111 S. Ct., at 1053 (Scalia, J., concurring in the judgment), the message of *Haslip* is being misunderstood, ignored or flouted. The Court should leave no doubt in this case that the Constitution will not tolerate such arbitrary and severe punishments.

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APPENDIX

APPENDIX A

At the time of ratification of the Fourteenth Amendment, most States had enacted comprehensive codifications describing the conduct which could be subjected to punishment and the maximum punishment that could be administered. *See* Ark. Stat. ch. 42 (1874) (general codification of crimes); *see id.* §§ 1357, 1364, 1381, 1386, 1388 (imposing maximum fines for a variety of offenses); *see* Cal. Stat. ch. 99 (1850) (general codification of crimes); *see id.* ch. 99 §§ 61, 63, 69, 86, 87; *see* Conn. Gen. Stat. tit. 12 (1866) (general codification of crimes); *see id.* §§ 90-92, 160-166, 180-181 (imposing maximum fines for a variety of offenses); *see* Del. Rev. Stat. chs. 126-133 (1852) (general codification of crimes); *see id.* ch. 128, §§ 3-6, 8-19, ch. 129, §§ 1-5 ch. 130, §§ 1-5, (imposing maximum fines for a variety of offenses); *see* Fla. Stat. chs. 42-56 (1872) (general codification of crimes); *see id.*, ch. 44 §§ 5, 9, 17, 18, 49, ch. 45 § 6, 8, 9; *see* Ga. Code §§ 4286-4336 (1861) (general codification of crimes); *see id.* §§ 4332, 4468, 4470, 4480, 4482 (imposing maximum fines for a variety of offenses); *see* Digest of the Crim. Laws of Ill. (1868) (general codification of crimes); *see id.* division 7 §§ 86, 91, 95, 100, division 8 § 199; *see* Ind. Stat. chs. 6-7 (1862) (general codification of crimes); *see id.* ch. 6 §§ 36, 37, 39, 43, 46; *see* Iowa Code tit. 24 (1873) (general codification of crimes); *see id.* ch. 3 §§ 3885-3886, 3889-3890, 3898 (imposing maximum fines for a variety of offenses); *see* Kan. Gen. Stat. ch. 31 (1876) (general codification of crimes); *see id.* ch. 31 §§ 80, 109, 113, 146 (imposing maximum fines for a variety of offenses); *see* Ky. Rev. Stat. Ann. ch. 28, arts. 1-26 (1867) (punishing full range of offenses, including offenses against the person, forgery, larceny, embezzlement, and trespass); *see id.* ch. 28, art. 14 § 6, art. 15 §§ 4, 7, art. 16 §§ 2, 5, art. 17 §§ 1-2, 6-8, 10, 12-20, 22-25, art. 18 §§ 4-5, art. 19 §§ 1-3, art. 20 § 2, art. 21 § § 1-5, art. 22 § 3, art. 23 § § 1-3; art. 24 §§ 2, 5, art. 25 §§ 2-5, 7-10 (imposing maximum fines for a variety of offenses); *see*

La. Rev. Stat. §§ 784-975 (1870) (general codification of crimes); *see id.* §§ 811, 815-819, 821-822, 824-826 (imposing maximum fines for a variety of offenses); *see* Me. Rev. Stat. chs. 117-139 (1871) (general codification of crimes); *see id.* ch. 120§§ 1-4, 6, 8, ch. 121 §§ 3, 6 (imposing maximum fines for a variety of offenses); *see* Md. Code art. 30 (1860) (general codification of crimes); *see id.* art. 30 §§ 19-20, 34, 38; *see* Mass. Gen. Stat. chs. 161-164 (1860) (general codification of crimes); *see id.* ch. 161 §§ 43, 44, 46, 48, 54-56, 91 (imposing maximum fines for a variety of offenses); *see* Minn. Stat. ch. 54 (1873) (general codification of crimes); *see id.* tit. 4 §§ 82, 84, 87, 96-97, 102-103, 105 (imposing maximum fines for a variety of offenses); *see* Miss. Rev. Code ch. 58 (1871) (general codification of crimes); *see id.* §§ 2547, 2569, 2597, 2653, 2656-2657 (imposing maximum fines for a variety of offenses); *see* Mo. Stat. ch. 42 (1870) (general codification of crimes); *see id.* art. 3 §§ 27, 31, 59, 65-66, 68-69 (imposing maximum fines for a variety of offenses); *see* Nev. Laws ch. 54 (1873) (general codification of crimes); *see id.* §§ 2368-2369, 2379, 2386-2387 (imposing maximum fines for a variety of offenses); *see* N.H. Gen. Laws chs. 269-284 (1878) (general codification of crimes); *see id.* ch. 275 §§ 1-4, 7, 8, 10, 11 (imposing maximum fines for a variety of offenses); *see* N.Y. Stat., ch. 1, tits. 1-7 (1869) (general codification of crimes); *see id.* ch. 1, tit. 3 §§ 69, 71, ch. 1, tit. 4 §§ 9-13 (imposing maximum fines for a variety of offenses); *see* N.C. Rev. Code. ch. 34 (1855) (general codification of crimes); *see id.* ch. 34 §§ 49, 65, 68-70, 83-88, 91-92 (imposing maximum fines for a variety of offenses); *see* Ohio Crim. Code (1878) (general codification of crimes); *see id.* ch. 3 §§ 6-7, 16, 20, 22 (imposing maximum fines for a variety of offenses); *see* Or. Stat. chs. 3-12 (1855) (general codification of crimes); *see id.* ch. 4 §§ 12-13, 16-17, 31-32, 34-40 (imposing maximum fines for a variety of offenses); *see* Pa. Rev. Penal Code (1860) (general codification of crimes); *see id.* §§ 100-106, 111-112, 119-121, 125-

130, 134, 155-162, 164-165 (imposing maximum fines for a variety of offenses); *see* R.I. Stat. tit. 30 (1857) (general codification of crimes); *see id.* tit. 30, ch. 214 §§ 10, 14, 16-20, 22, 24-28 (imposing maximum fines for a variety of offenses); *see* S.C. Rev. Stat. tit. 2 (1894) (general codification of crimes); *see id.* § § 276-282, 288-295 (imposing maximum fines for a variety of offenses); *see* Tex. Laws arts. 355-572 (1850) (general codification of crimes); *see id.* arts. 380-382, 386, 389, 391, 393 (imposing maximum fines for a variety of offenses); *see* Vt. Stat. tit. 38 (1851) (general codification of crimes); *see id.* ch. 104 §§ 2-10, 15, 19-22, 26-28 (imposing maximum fines for a variety of offenses); *see* Va. Code tit. 54 (1860) (general codification of crimes); *see id.* ch. 192 §§ 18, 24, 27, 30, 32; *see* W.Va. Code chs. 143-152 (1870) (general codification of crimes); *see id.* ch. 144 §§ 9-11, ch. 145 §§ 5-8, 23 (imposing maximum fines for a variety of offenses); *see* Wis. Stat. tit. 27 (1871) (general codification of crimes); *see id.* ch. 164 §§ 23, 29, 31-32, 38, 42, 45, ch. 165 §§ 16-18, 23 (imposing maximum fines for a variety of offenses).

APPENDIX B

POST-*HASLIP* DECISIONS UPHOLDING PUNITIVE DAMAGE AWARDS

I. Federal Courts of Appeals Decisions	Nature of Conduct:	Amount of Actual Damages Upheld by Court:	Amount of Punitive Damages Upheld by Court:
Keenan v. City of Philadelphia, 1992 WL 370033 (3d Cir. Dec. 17, 1992)	Gender Discrimination	$ 640,000	$ 666,666.65
Estes v. Time Ins. Co., 1992 WL 353272 (8th Cir. Nov. 3, 1992)	Tortious Interference	$ 300,000	$ 1,700,000
Robertson Oil Co. v. Phillips Petroleum Co., 979 F.2d 1301 (8th Cir. 1992)	Tortious Interference & Fraud	$ 750,000	$ 8,000,000
Wackenhut Applied Technologies Ctr., Inc. v. Sygenetron Protection Systems, Inc., 979 F.2d 980 (4th Cir. 1992)	Tortious Interference	$ 100,000	$ 350,000
Latham Seed Co. v. Nickerson American Plan Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992)	Fraud	$ 1,100,000	$ 10,000,000
Peoples Bank & Trust Co. v. Globe Int'l Publishing, Inc., 978 F.2d 1065 (8th Cir. 1992)	False Light/Invasion of Privacy	Remanded for "Substantial Remittitur" of $650,000	$ 850,000

Jordan v. Clayton Brokerage Co., 975 F.2d 539 (8th Cir.), *petition for cert. filed*, (U.S. Dec. 17, 1992) (No. 92-1054)	Commodities Fraud	$ 7,923	$ 400,000
Morgan v. Woessner, 975 F.2d 629 (9th Cir. 1992)	False Imprisonment, Battery & Infliction of Emotional Distress	$ 90,000	$ 100,000
Broadcor Capital Corp. v. Summa Medical Corp., 972 F.2d 1183 (10th Cir. 1992)	Refusal to Register & Transfer Stock Certificates	$ 1,600,000	$ 400,000
Waits v. Frito-Lay, Inc., 1992 WL 183781 (9th Cir.), *cert. denied*, (Jan. 19, 1993) (No. 92-863)	Tort of Voice Misappropriation	$ 375,000	$ 2,000,000
Brown v. Petrolite Corp., 965 F.2d 38 (5th Cir. 1992)	Business Defamation	$ 60,000	$ 700,000
Stephens, Inc. v. Gelderman, Inc., 962 F.2d 808 (8th Cir. 1992)	Securities Fraud	$ 1,381,000	$ 1,000,000
Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992)	Products Liability	$ 9,000,000	$ 12,500,000
Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir.), *reh'g denied*, 951 F.2d 347 (5th Cir. 1991), *cert. denied sub nom.* 112 S. Ct. 1778 (1992)	Products Liability	$ 2,590,000	$ 6,100,000

Owens v. International Business & Mercantile Reassurance Co., 940 F.2d 1538 (10th Cir. 1991)	Bad Faith Denial of Claim	$ 1,232,180	$ 2,000,000
Braswell v. Conagra, Inc., 936 F.2d 1169 (11th Cir. 1991)	Fraud & Breach of Contract	$ 4,550,000	$ 9,100,000
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991)	Bad Faith Denial of Claim	$ 1,000	$ 500,000
Guill v. Academy Life Ins. Co., 935 F.2d 1286 (4th Cir.), *cert. denied*, 112 S. Ct. 418 (1991)	Commission Conversion	$ 76,839	$ 500,000
	Federal Appellate Total		$ 56,866,666.65

I. Federal District Court Decisions	**Nature of Conduct:**	**Amount of Actual Damages Upheld by Court:**	**Amount of Punitive Damages Upheld by Court:**
Continental Trend Resources, Inc. v. OXY USA, Inc., No. Civ. 90-1006-A (W.D. Okl. Oct. 20, 1992), *appeal docketed*, No. 92-6350 (10th Cir. Oct. 23, 1990)	Tortious Interference	$ 269,000	$30,000,000
Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp., 1992 WL 211554 (E.D. Pa. Aug. 24, 1992), *appeal docketed*, No. 92-6350 (10th Ciir. Oct. 23, 1992)	Fraud, Tortious Interference & Trademark Infringement	$ 25,850,000	$ 16,500,000
Weathers v. American Family Mutual Ins. Co., 793 F. Supp. 1002 (D. Kan. 1992)	Outrage, Malicious Prosecution & Breach of Contract	$ 4,800,000	$ 2,600,000
Laughinghouse v. Risser, 786 F. Supp. 920 (D. Kan. 1992)	Outrage	$ 100,000	$ 600,000
Snead v. Redland Aggregates Ltd., No. A-90-CA-38 (W.D. Tex. May 27, 1992)	Trade Libel	$ 2	$ 1,000,000
Burke v. John Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991)	Products Liability	$ 390,000	$ 28,000,000
Capstick v. Allstate Ins. Co., No. Civ.-90-284-5 (E.D. Okl. March 26, 1991), *amended* (E.D. Okl. June 11, 1991), *appeal docketed*, No. 91-7088 (10th Cir. June 28, 1991)	Bad Faith Denial of Claim	$ 3,000	$ 2,000,000

Ross v. Jackie Fine Arts, Inc., 1991 WL 213815 (D. S.C. 1991)	Fraud & Misrepresentation	$ 881,359	$ 13,875,000
ContiCommodity Services, Inc. v. Prescott, Ball & Turben, Civil Action No. H-91-81 (S.D. Tex. Apr. 20), *appeal docketed*, No. 92-2617 (5th Cir. July 31, 1992)	Securities Fraud	$ 3,375,000	$134,000,000
Defenders Indus., Inc. v. Northwestern Mutual Life Ins. Co., No. CIV. A. 3:88-3231-17, 1992 WL 364904 (D.S.C. Apr. 29, 1992)	Insurance Fraud	$ 106,513.74	$ 5,000,000
	Federal District Court Total		$233,575,000

III. State Appellate Decisions	**Nature of Conduct:**	**Amount of Actual Damages Upheld by Court:**	**Amount of Punitive Damages Upheld by Court:**
Texas Farmers Ins. Co. v. Soriano, 1992 WL 350627 (Tex. Ct. App. Nov. 30, 1992)	Bad Faith Denial of Claim	$ 520,577	$ 1,000,000
Browning-Ferris Indus. Inc. v. Lieck, 1992 WL 336113 (Tex. Ct. App. Nov. 19, 1992)	Malicious Prosecution	$ 1,750,000	$ 1,500,000
Mistich v. Pipelines Inc., 1992 WL 332598 (La. App. Nov. 17, 1992)	Personal Injury	$ 3,100,000	$ 4,000,000
Maintenance Equipment Company, Inc. v. Godley Builders, 420 S.E.2d 199 (N.C. App. 1992)	Malicious Trespass	$ 4,550	$ 175,000
Aero Garage Corp. v. Hirschfeld, 586 N.Y.S.2d 611 (N.Y. App. Div. 1992)	Malicious Breach of Lease	$ 74,000	$ 150,000
Prudential Ins. Co. of America v. Jefferson Associates, Ltd., 839 S.W.2d 866 (Tex. Ct. App. 1992)	Fraudulent Concealment & Misrepresentation	$ 6,000,000	$ 14,300,000

Atkins v. Lee, 603 So. 2d 937 (Ala. 1992)	Wrongful Death	None	$ 6,875,000
Viking Insurance Co. of Wisconsin v. Jester, 836 S.W.2d 371 (Ark. 1992)	Bad Faith Denial of Claim	$ 1,000	$ 250,000
Davis v. Celotex Corp., 420 S.E.2d 557 (W.Va. 1992)	Wrongful Death	$ 66,000	$ 40,000
TXO Production Corp. v. Alliance Resources Group, 419 S.E.2d 870 (W.Va. 1992), *cert. granted*, 113 S. Ct. 594 (1992)	Slander of Title	$ 19,000	$ 10,000,000
Market Tavern, Inc. v. Bowen, 610 A.2d 295 (Md. App.), *cert. denied*, 614 A.2d 84 (Md. 1992)	Battery, Pain & Suffering	$ 150,000	$ 150,000
Intercontinental Life Insurance Co. v. Lindblom, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 1200 (1992)	Fraud & Bad Faith Denial of Claim	$ 10,000	$ 1,000,000
Hilgedick v. Koehring Finance Corp., 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76 (1992)	Tortious Interference & Bad Faith	$ 730,482	$ 1,800,000
Eagle-Picher Industries, Inc. v. Balbos, 604 A.2d 445 (Md. 1992)	Wrongful Death	$ 1,800,000	$ 150,000
MGW, Inc. v. Fredricks Development Corp., 5 Cal. App. 4th 1992, 6 Cal. Rptr. 2d 888 *review granted*, 832 P.2d 898 (1992)	Tortious Interference & Conspiracy	$ 558,000	$ 2,000,000

Wollersheim v. Church of Scientology of California, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992)	Intentional Infliction of Emotional Injury	$ 500,000	$ 2,000,000
General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992)	Products Liability & Wrongful Death	$ 75,000	$ 7,500,000
Estate of Baxter v. Grange Mutual Casualty Co., 597 N.E.2d 1157 (Ohio App. 1992)	Bad Faith Denial of Claim	$ 114,525	$ 250,000
Pote v. Jarrell, 412 S.E.2d 770 (W. Va. 1991)	Malicious Prosecution & Abuse of Process	$ 12,000	$ 35,000
Buzzard v. Farmers Ins. Co., Inc., 824 P.2d 1105 (Okl. 1991)	Bad Faith Denial of Claim	$ 212,000	$ 400,000
General Motors Corp. v. Saenz, 829 S.W.2d 230 (Tex. Ct. App. 1991)	Products Liability	$ 4,784,447.06	$ 2,500,000
Valley Building & Supply, Inc. v. Lombus, 590 So. 2d 142 (Ala. 1991), *aff'd*, No. 89-1788, 1991 LEXIS 1169 (Ala. No. 22, 1991)	Wrongful Death	None	$ 600,000
Texas Employer's Insurance Association v. Puckett, 822 S.W.2d 133 (Tex. Ct. App. 1991)	Bad Faith Termination of Benefits & Mental Anguish	$ 150,000	$ 1,500,000
Associated Financial Services Co. of Alabama, Inc. v. Barbour, 592 So. 2d 191 (Ala. 1991)	Fraud	$ 15,000	$ 700,000

Las Palmas Associates v. Las Palmas Center Associates, 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301 (1991)	Fraud & Breach of Contract	$ 232,000	$ 2,000,000
Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991), *cert. denied*, 112 S. Ct. 1175 (1992)	Battery	$ 5,001	$ 1,300,000
G.N. Danavox, Inc. v. Starkey Laboratories, Inc., 476 N.W.2d 172 (Minn. App. 1991), *cert. denied*, 112 S. Ct. 2940 (1992)	Tortious Interference & Deceptive Trade Practices	$ 552,000	$ 1,500,000
Harrell v. Old American Insurance Co., 829 P.2d 75 (Okla. App. 1991)	Bad Faith Denial of Claim	$ 41,800	$ 250,000
Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135 (Tex. Ct. App. 1992)	Bad Faith Denial of Claim	$ 708,800	$ 2,000,000
United Farm Bureau Mut. Ins. Co. v. Ira, 577 N.E.2d 588 (Ind. App. 4 Dist. 1991)	Bad Faith Denial of Claim	$ 55,000	$ 108,000
Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854 (Ala. 1991)	Fraud	$ 1,000	$ 499,000
Principal Financial Group v. Thomas, 585 So. 2d 816 (Ala.), *cert. denied*, 112 S. Ct. 649 (1991)	Bad Faith Denial of Claim	$ 1,000	$ 750,000

Fraser v. Reynolds, 588 So. 2d 448 (Ala. 1991)	Fraudulent Inducement of Limited Partners to Invest in Real Estate Limited Partnership	$ 16,081	$ 375,000
Berg v. Transamerica Ins. Co., 163 Wis. 2d 1091, 474 N.W.2d 528 (table), *review denied*, 477 N.W.2d 286 (1991)	Negligent Representation & Contract Fraud	$ 363,000	$ 186,000
Granite Const. Co. v. Mendoza, 816 S.W.2d 756 (Tex. Ct. App. 1991)	Negligence in Worker's Compensation Death Claim	Unclear	$ 2,250,000
K-Mart Corporation v. Pearson Estate of Ramos, 818 S.W.2d 410 (Tex. Ct. App. 1991)	Personal Injury	$ 1,718,870	$ 2,200,000
Transportation Ins. Co. v. Moriel, 814 S.W.2d 144 (Tex. Ct. App. 1991)	Bad Faith Denial of Claim	$ 101,000	$ 1,000,000
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Oberg v. Honda Motor Co., Ltd., 814 P.2d 517 (Or. App. 1991)	Product Liability	$ 735,512.31	$ 5,000,000
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Yamaha Motor Co. v. Thornton, 579 So. 2d 619 (Ala. 1991)	Product Liability & Wrongful Death	None	$ 750,000
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State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590 (Tex. Ct. App. 1991)	Bad Faith Denial of Claim	$ 165,000	$ 660,000
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Standard Plan, Inc. v. Tucker, 582 So. 2d 1024 (Ala. 1991)	Bad Faith Denial of Claim	$ 1,083.19	$ 500,000
Smith v. States General Life Ins. Co., 592 So. 2d 1021, (Ala. 1992)	Fraud in Medical Insurance Coverage	$ 600	$ 250,000
Union Mortgage Co. v. Barlow, 595 So. 2d 1335 (Ala.) *cert. denied*, 113 S. Ct. 301 (1992)	Fraud, Conspiracy & Breach of Contract	$ 150,000	$ 6,001,000

Hanson v. American National Bank & Trust Co., 1992 WL 373057 (Ky. Dec. 17, 1992)	Fraud & Misrepresentation	$ 1,065,000	$ 5,775,000
Smart v. Caterpillar, Inc., 170 Wis. 2d 732, 492 N.W.2d 190 (table) (1992)	Product Liability	$ 4,000,000	$ 7,500,000
		State Appellate Total	$128,779,000

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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AMICUS CURIAE BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae Product Liability Advisory Council, Inc. will address the following issue:

Does an award of punitive damages made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), and in the absence of alternative procedural safeguards providing substantially equivalent protection against arbitrary and capricious punishment, violate the defendant's procedural due process rights?

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TXO PRODUCTION CORP.,
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Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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AMICUS CURIAE BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Product Liability Advisory Council, Inc. ("the Advisory Council") is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. Its members, together with other corporations doing business in this country, have borne the brunt of the massive and

discriminatory increase in punitive damages verdicts that has occurred in the last two decades and that this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), has not succeeded in stemming.[1]

Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive [damages] awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings iii*, 50 (1987). "[J]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect . . . . [W]e can detect a separate, statistically independent effort for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik, M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

The Advisory Council and its members therefore have a particular interest in ensuring that this Court is fully informed about the features of modern punitive damages proceedings, such as West Virginia's, that fundamentally distinguish them from historical common law proceedings and that have generated the arbitrariness, discrimination, and excessiveness that have come to characterize punitive damages proceedings in the last 20 years. The Advisory Council also has an interest in ensuring that this Court is fully informed about the nature of the procedural safeguards that are needed to reduce to a constitutionally allowable level the risk of such improper punishment.

[1] Consent letters have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although due process requires no particular procedure for a punitive damages award to be made, the proceedings in which such punishment is inflicted must preserve within reasonable bounds the fundamental balance that historically obtained between defendants' "interest in rational decisionmaking and [the states'] interest in meaningful individualized assessment of appropriate deterrence and retribution." *Haslip*, 111 S. Ct. at 1044. West Virginia has chosen in recent years to adopt numerous substantive, procedural, and evidentiary rules that depart significantly from those which governed punitive damages proceedings both at common law and when the Due Process Clause of the Fourteenth Amendment was added to the Constitution.

Those departures from the historically approved approach to punitive damages have fundamentally increased the risk of arbitrary, discriminatory, and excessive punishment, and West Virginia has failed to provide offsetting procedural safeguards, such as those approved by this Court in *Haslip*, to preserve substantially the level of protection that was provided at common law against arbitrary, discriminatory, and excessive punitive damages. Such procedural safeguards, or their substantial equivalent, are necessary to restore the balance that historically existed, that is constitutionally required, and that this Court has emphasized, between punitive-damages defendants' interest in rational decisionmaking and the states' interest in appropriate individualized punishment.

ARGUMENT

I. WEST VIRGINIA HAS IMPERMISSIBLY UPSET THE HISTORICALLY APPROVED AND CONSTITUTIONALLY REQUIRED BALANCE BETWEEN DEFENDANTS' INTEREST IN RATIONAL DECISIONMAKING AND THE STATES' INTEREST IN ENSURING APPROPRIATE PUNISHMENTS

A. Due Process Requires States to Preserve the Historically Approved Balance

In *Haslip*, upon reviewing "the traditional common-law approach" that had been used "for two hundred years" in awarding punitive damages, this Court concluded, "[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.* at 1043. The Court defined the "traditional common-law approach" as that in which "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 1042.

Justice Scalia, concurring in the judgment, similarly observed that "it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury." *Id.* at 1047 (Scalia, J., concurring in the judgment). He then concluded that, "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity." *Id.* at 1054. Justice Kennedy, also concurring in the judgment, likewise concluded that "[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to

be deemed necessary." *Id.* at 1055 (Kennedy, J., concurring in the judgment).

Amicus Advisory Council has no quarrel with any of those affirmations of the constitutionality of "the traditional common-law approach," *as that approach is described in the Haslip opinions.* Rather, *amicus* submits that the approach to punitive damages followed by the West Virginia courts below is in important respects *not* the traditional common-law approach and therefore cannot be upheld on the basis of historical usage and approval. As *Haslip* recognized, the core question then becomes whether the approach in question "reasonably accommodated [the defendant's] interest in rational decisionmaking and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution." 111 S. Ct. at 1044. That is, if West Virginia has chosen to depart in substantial ways from the historically approved common-law approach, has it done so in a manner that impermissibly increases the risk of arbitrary or discriminatory decisionmaking without also introducing offsetting procedural safeguards that reasonably preserve the approved historical balance?

Like the majority, both opinions concurring in the judgment in *Haslip* implicitly acknowledge that the due process inquiry requires more than the simple question of whether the punitive damages system being challenged provides for an exercise of jury discretion. Justice Scalia cited the principle that "we must look to settled *usages and modes of proceeding* existing in the common and statute law of England, before the emigration of our ancestors . . . ." *Id.* at 1049 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-77 (1856)) (emphasis added). Similarly, he cited the rule that due process "is met *if the trial is had according to the settled course of judicial proceedings.*" *Id.* at 1050, quoting *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876) (emphasis added by Scalia, J.). Still further, he articu-

lated the principle that, "consistently with the requirements of due process, *no change* in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, *and guard him against the arbitrary action of government.*" *Id.* at 1050 (quoting *Twining v. New Jersey*, 211 U.S. 78, 101 (1908)) (emphases in original deleted; emphasis added).

Similarly, Justice Kennedy stated, "This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process." *Id.* at 1055. To determine whether adequate protection against such bias or prejudice existed, he indicated that courts should determine whether "the usual protections" have been provided. *Id.* at 1054-56.

These expressions are particularized restatements of the fundamental due process principle that the procedures required to guard against the risk of arbitrary or discriminatory deprivations vary "according to specific factual contexts," *Hannah v. Larche*, 363 U.S. 420, 442 (1960), and "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "As long as the discretion [in punitive damages proceedings] is exercised within reasonable constraints," as informed by the historically approved balance, "due process is satisfied." *Haslip*, 111 S. Ct. at 1044, citing *Schall v. Martin*, 467 U.S. 253, 279 (1984); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979); *McGautha v. California*, 402 U.S. 183, 207 (1971).

The due process clause could not sensibly require any less. If a state could *per se* satisfy due process merely by having punitive damages determined by a jury exercising its discretion, a state could merely provide a jury and at the same time take away every safeguard historically

provided against unjust punishment by juries. For example, under such a theory a state could put the burden on the defendant to prove that he did *not* commit the allegedly wrongful act, put the burden on the defendant to prove beyond a reasonable doubt that punishment in the form of punitive damages should *not* be inflicted, authorize punishment in the form of punitive damages for mere negligence or even without fault, establish various presumptions against the defendant, and make dozens of additional substantive, procedural, and evidentiary changes that were historically unheard of and that greatly increase the risk of arbitrary, discriminatory, or excessive punishment.

The factual questions to be answered, therefore, are whether the punitive damages approach followed by the West Virginia courts below differs from the common-law approach and, if so, whether the differences substantially alter, to defendants' detriment, the fundamental balance between defendants' interests and the states' interests and require offsetting procedural safeguards. *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L.J. 319 (1957); Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 742-43 (1963) ("One of the chief concerns of the Constitution was to strike a lasting balance between the individual and the community . . . . Such a balance might be composed of very different elements at different times. It was and is a matter of proportion. The infant nation could grow to be a giant, but its organic balance must remain . . . . [I]t is the duty of judges to maintain that structure.") As shown below, the answers are affirmative.

B. West Virginia Has Upset the Historically Approved Balance

1. *Punitive Damages Proceedings at Common Law Provided Substantial Protection Against the Infliction of Arbitrary, Discriminatory, and Excessive Punishment*

English common law first approved of jury awards of punitive damages in 1763 in *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763). For more than a hundred years thereafter, "all of these cases [allowing punitive damages] share[d] one common attribute: they involved acts that resulted in direct affronts to the honor of the victims. The defendants' acts were insults that were likely to provoke reactions of outrage." Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 15 (1982). *See* K. Redden, *Punitive Damages*, § 2.2(A)(2) (1980).

Thus, punitive damages historically were awarded in England (a) for intentional torts, (b) against the individuals who actually committed the wrongful acts, (c) for wrongs that inflicted humiliation and emotional distress, and (d) in an era when compensatory damages for those forms of injury generally could not be recovered. *See* Ellis, *supra*, 56 S. Cal. L. Rev. at 14-18. Several of the early English cases explicitly justified punitive damages as both punishment and compensation for plaintiffs' intangible injuries. *See* K. Redden, *supra*, §§ 2.2(B) and 2.2(C); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).

In this country, too, punitive damages long were available only in a "comparatively small class of torts" (1 T. Street, *The Foundations of Legal Liability* 479 (1906)) —those involving what the earliest American decisions described as conduct "of the most atrocious and dishonorable nature." *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (1791). *See* R. Bauer, *Essentials of the Law of Damages* § 47 (1919). For the most part, these offenses were "dignitary torts" personally inflicted by one individual on another—primarily "the traditional intentional torts" such as assault, slander, seduction, and false imprisonment (*Symposium Discussion*, 56 S. Cal. L. Rev. 155, 156 (1982) (remarks of Prof. Ellis)), although by the last quarter of the nineteenth century, several courts had begun to speak not only of intentional wrongdoing, but in vague, ambiguous terms such as "malice," "wantonness," and "willfulness." *See* cases cited and discussed in *Smith v. Wade*, 461 U.S. 30, 38-46 (1983); *id.* at 68-84 (Rehnquist, J., dissenting). In any event, Pollock was able to summarize the law near the turn of the century by stating that "[t]he kind of wrongs to which [punitive damages] are applicable are those which, besides the violation of the right or the actual damage, impart insult or outrage . . . ." F. Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising From Civil Wrongs in the Common Law* 186 (1904). *See* T. Shearman & A. Redfield, *A Treatise on the Law of Negligence* § 600 (1869) (punitive damages reserved for "morally criminal" conduct).

With rare exceptions, punitive damages historically also were assessed only against individuals, the persons who actually inflicted the insult or harm. The exceptions seem to have arisen almost exclusively in actions against common carriers and public utilities, based on the theory that such defendants had assumed special obligations to the public, especially with respect to safety. *See* J. During, *The Law of Negligence* § 415 (1986); 2 S. Greenleaf, *A Treatise on the Law of Evidence* 263 n.a. (S. Croswell 14th rev. ed. 1983); 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 371a (A. Sedgwick & J. Beale 9th rev. ed. 1912).

Moreover, the sums awarded as punitive damages were in the same range as were the fines set by statute for the type of conduct that gave rise to the punitive damages. It appears that the largest *combined* award of punitive and compensatory damages in the nineteenth

century was $20,000. *See Caldwell v. New Jersey Steamboat Co.*, 47 N.Y. 282, 283 (1872) (awarded to plaintiff passenger "maimed and crippled for life" by exploding steamboat boiler). Criminal fines were not substantially different. *See, e.g.*, F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) (citing statutes) (fines for assault and battery ranging from $500-$3,000; fines for malicious mischief of up to $1,000; fines for seduction of up to $5,000).

As recently as 1930, Dean McCormick characterized verdicts of $50,000, $33,333.33 (reduced to $10,000), and $12,650 (reduced by $5,000) as "startlingly large verdicts of punitive damages." McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. Rev. 129, 149 & n.114 (1930), citing *Duncan v. Record Publishing Co.*, 145 S.C. 196, 143 S.E. 31 (1927); *Livesley v. Stock*, 281 P. 70 (Cal. 1929); *Seaman v. Dexter*, 96 Conn. 334, 114 A. 75 (1921). In 1955 an award of $75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980).

In sum, until recently, common-law punitive damages were awarded for a narrow category of tortious conduct, in part as compensation, against wrongdoing individuals, and in modest amounts closely related to the criminal fines for similar conduct. *See Haslip*, 111 S. Ct. at 1066 (O'Connor, J., dissenting).

2. *Punitive Damages Proceedings in West Virginia Depart Significantly from the Common-Law Approach*

The punitive damages system applied below by the West Virginia courts differs in several respects from the historically approved common-law approach. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992). First, unlike in the historical punitive damages cases, the tort for which punitive damages were awarded below was not a dignitary tort that inflicted

personal humiliation and insult or that caused any physical harm; it was a business tort—slander of title to a piece of property.

Second, the damages that result from slander of title are fully compensable under West Virginia law. The punitive damages award therefore cannot be justified, as punitive damages historically were in part, on the basis that a clear, but intangible, injury otherwise would go uncompensated. West Virginia law even permitted the plaintiff below to recover as compensatory damages the $19,000 in attorneys' fees incurred by him in defending against the suit that arose out of the allegedly false quitclaim deed that constituted the slander of title.

Third, unlike in historical punitive damages cases, the punitive damages here were awarded not against the actual wrong-doing individuals, but against the corporation that employed them. Also, that corporation did not fall within the historical exception of being a common carrier or public utility with a special obligation to protect the public safety.

Fourth, the size of the punitive damages award, $10 million, was 10,000 times the maximum criminal fine for fraud in West Virginia. *See* W. Va. Code § 61-3C-4 (Michie 1992) (maximum fine of $10,000 for crime of fraud). Unlike historical punitive damages awards, therefore, it was far out of the range of criminal fines for similar conduct.

Fifth, the Supreme Court of Appeals of West Virginia upheld the punitive damages award in part "because appellant and its agents and servants failed to conduct themselves as gentlemen" (419 S.E.2d at 875) and in part because that court perceived the conduct as having been not merely "really stupid," but "really mean." *Id.* at 887-90. The court also expressly recognized that, although punitive damages originally "were awarded only to deter malicious and mean-spirited conduct," their use today "has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely

to cause serious harm." *Id.* at 887. West Virginia thus now employs a "really stupid/really mean" test and a "gentlemanliness" test, both of which were unheard of at common law and encompass a state of mind or culpability that historically did not give rise to punitive damages.

Sixth, West Virginia no longer limits the use of punitive damages for the purpose of directly deterring those who otherwise would inflict insult and physical harm. It instead permits such punishment to "increase[] the likelihood that settlement decisions will be made by upper management employees . . . ." *Id.* at 888. Thus, the purpose of punitive damages now is to effect indirect changes in conduct, and, specifically, to force corporate defendants to settle lawsuits.

Seventh, West Virginia now evaluates the propriety of the size of a particular punitive damages award for a particular wrongful act not on the basis of the harm that the defendant's act caused or threatened to cause, but on the basis of the cumulative harm that "[t]he type" of action "could potentially cause . . . to other victims" if repeated on numerous occasions in the future. *Id.* at 889.

Eighth, West Virginia now allows juries and courts to determine the appropriate size of a punitive damages award not on the basis of the wealth of the individual who committed the alleged wrong, and not even on the basis of the wealth of the company that employs that individual, but on the basis of the wealth of a division of the company that owns the company that employs the individual, even though that division's assets were generated by more than a dozen separate corporate entities. *Id.* at 890. West Virginia thus presumes, in punitive damages proceedings only, that the corporate veil is pierced. West Virginia's modern theory is that it "is the pocketbook of [the parent corporation] that the jury verdict must reach," without consideration of what devastation might be wrought on the actual defendant company by a punitive award based on a percentage of the wealth of a much larger parent company. *Id.* at 890.

3. *Punitive Damages Proceedings in Other States Depart Significantly from the Common-Law Approach*

How this Court treats West Virginia's departures from the common-law approach will provide guidance to other jurisdictions. That is of considerable importance because substantial departures from the historical common-law approach to punitive damages are not unique to West Virginia.

In the last 30 years, most states have abandoned the inveterate rule against allowing punitive damages for breach of contract and now imply a "covenant of good faith" into insurance contracts and award punitive damages for "bad-faith breach" of the covenant. *See Haslip*, 111 S. Ct. at 1066 (O'Connor, J., dissenting); *Punitive Damages: A Constructive Examination*, Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation 5-2, 5-3 (1986). In addition, "a significant minority of jurisdictions have extended the action to other kinds of contract cases." *Id.* at 5-4. *See generally* Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind. L. Rev. 668 (1975).

Furthermore, although punitive damages historically were justified in part on the ground that they were needed to fill in the gap that existed because compensatory damages were not allowed for various intangible harms (*see* p. 8, *supra*), in the last few decades every jurisdiction has greatly expanded the category of intangible harms for which compensatory damages are awarded. Modern damages law permits compensatory damages, for example, for pain and suffering (*see, e.g., Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3d Cir.), *cert. denied*, 385 U.S. 897 (1966)); humiliation (*see, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); loss of consortium (*see, e.g., Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980)); emotional trauma by a plaintiff not in the zone of danger (*see, e.g., Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912,

69 Cal. Rptr. 72 (1968)); loss of parental society and guidance (*see, e.g., Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981)); and loss of a child's counsel and advice to a parent (*see, e.g., Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980)), to name but a few.

Also unlike the historical common-law approach is the modern infliction of punitive damages not on the individuals who actually inflicted the harm, but on corporations who employ those individuals. Whereas punitive damages historically were awarded almost exclusively against individuals who committed insult torts such as slander, seduction, assault, and battery, today's awards in all punitive-damages jurisdictions typically are against corporations and are often based on acts that (1) involved no "insult," (2) were not aimed at the plaintiff, (3) were not intended to cause harm, and (4) were the acts of low-level corporate employees. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (reversing judgment holding corporate trucking company liable for $100,000 in punitive damages when one of its drivers stopped his truck on side of road to use a roadside telephone in a hard rain, and plaintiff drove his car into back of the truck.)

4. *The Numerous Departures from the Common-Law Approach to Punitive Damages Have Upset the Historically Approved Balance Between the Respective Interests of Defendants and the States*

These and other modern departures, in West Virginia and elsewhere, from the historical common-law approach to punitive damages have significantly upset the common-law balance between punitive-damages defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution. When punitive damages were awarded for clear-cut personal torts such as assault, battery, seduction, and false imprisonment, there was a relatively low risk that the jury would erroneously attribute to the tortfeasor an intent to do wrong. Today, on the other hand, the risk is considerably greater

that a jury will err in trying to decide whether a business person acted in "bad faith" in interpreting a complex insurance contract or other business contract.

In product liability cases, which were unheard of at common law and came into vogue in 1964 with the promulgation of section 402A of the Restatement (Second) of Torts, the risk is even greater that juries will err in trying to decide whether punitive damages should be awarded. This is especially so because. in determining whether a product is "defective," juries in most jurisdictions are told to conduct a complex "risk-utility balance" of factors:

> These factors include the availability of substitute products, the manufacturer's ability to eliminate some of the risks associated with the product without adversely affecting the usefulness or cost of the product, and the expectations of the ordinary consumer.

Carter v. Massey-Ferguson, Inc., 716 F.2d 344, 348 (5th Cir. 1983); *see also Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980) ("evidence of the actual use of, or capacity to use, safer alternatives is relevant"). This requires a jury to try to comprehend and reanalyze arcane engineering, scientific, and probabilistic determinations far more difficult and judgmental than the common historical issues such as whether a defendant intended to shoot at the plaintiff or acted knowingly in seducing the plaintiff's spouse. Moreover, the more carefully and explicitly a manufacturer tries to conduct and record the detailed risk-utility analysis required to make a product that is nondefective under product liability law, the more likely it is that, if the jury later disagrees with the manufacturer's judgment. the jury also will conclude that the manufacturer acted in a calculated manner with "conscious indifference to the rights or welfare of [others]" and will award punitive damages. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

Indeed, modern plaintiffs' lawyers regularly rely on the model of the fully rational, carefully calculating corporation in their attempts to persuade juries to award punitive damages. Plaintiffs' lawyers regularly argue that punitive damages should be awarded against corporate manufacturers precisely because corporations make decisions solely on the basis of risk-benefit calculations. One of the country's most prominent plaintiffs' lawyers argues, for example, that a corporation is

> something that does not care or love or have babies of its own—something that does not even breathe. And this "non-breather," shall we call it, had a special kind of blood—it was green, and it was made of money. It sustained itself on money, large amounts of money. It ate money and craved money, more money. More and more money. It lived for money and dreamed of money and even excreted money . . . . Then one day this corporation, this non-breather, discovered a new way to obtain large amounts of money very easily. Do you know what it did?

Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A. J., Apr. 1, 1986, at 62, 66.

The risk of arbitrary and discriminatory punishment has further increased as a result of the modern focus on corporate defendants, rather than on the individuals who actually committed the harmful acts. The increased risk derives from the relative ease of requiring a "non-breather" entity to pay a large sum of money and from the prejudice spawned by the relatively much greater assets of corporations, by the out-of-state location of many corporate defendants' headquarters, and by the general modern antipathy for corporations. Social science research now shows that the public holds corporations to "increasingly, and perhaps unrealistically, high standards," believes that "[e]ven if a corporation has unintentionally produced a defective product, . . . the company should still be punished," and generally is "cyn-

ic[al] about corporate ethics." *Prod. Liab. Law & Strategy*, Vol. XI, no. 3, at 4 (Sept. 1992).[2]

The risk of excessive punishment is still further compounded by the fact that punitive damages today are awarded even though the large gaps in compensatory damages that historically existed no longer exist. The risk of excessive punishment could be alleviated by jury instructions explaining that compensatory-damages dollars have just as much deterrent and retributive force as do punitive-damages dollars and by explaining to juries the basic deterrent and retributive principles that dictate what total award is reasonably necessary to achieve proper deterrence and retribution. But such instructions are not given in West Virginia or elsewhere, and ever-larger punitive awards are added to ever-expanding

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[2] This is not to say that the infliction of punitive damages on a corporate employer for the acts of its employee has no arguably rational basis. *See, e.g. Haslip*, 111 S. Ct. at 1041 ("If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents.") Rather, it is simply to say that, however well-intended, such an approach raises the risk that punishment will be arbitrary, discriminatory, or excessive.

In another context, however, this Court has recognized that imposing punitive damages on an employer, rather than on the wrongdoing employee, is not the most effective approach to deterrence. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court held a municipality, as opposed to an individual municipal employee, immune from punitive damages liability under 42 U.S.C. section 1983. The Court clearly indicated its belief that deterrence of violations would be better accomplished by punitive damages awards against the wrongdoing individual:

> Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

453 U.S. at 269-70.

compensatory awards never remotely approached at common law.

The modern expansion of compensatory damages has in several ways greatly reduced the deterrent and punishment justifications for punitive damages. As has long been recognized, compensatory damages also deter and punish undesirable behavior. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1173-74 (1931). Accordingly, as the certainty, number, and size of compensatory damages for tortious conduct has increased, so has their deterrent and punishment force, thereby making it less frequently justifiable to supplement them with punitive damages.

The deterrent and punitive functions of compensatory damages have even further increased as a result of modern developments in tort law, resulting in still further reductions in the historical justification for punitive damages in most circumstances. New causes of action, such as strict liability in tort, have been recognized. *See, e.g., McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (Tex. 1967) (recognizing strict liability in tort as a cause of action in Texas). The range of potential plaintiffs has grown. *See, e.g., Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969) (extending strict liability to cover third parties). Immunities have been eliminated or narrowed. *See, e.g., Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987) (abolishing interspousal immunity); Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (West 1993) (waiving governmental immunity for certain causes of action). The likelihood that those responsible for causing injury will be liable for compensatory damages has increased considerably as a result of modern evidence rules such as those admitting evidence of subsequent remedial measures and greatly expanded expert testimony, as well as modern procedural devices such as class actions, liberal joinder of claims, liberal joinder of parties, and liberal discovery. *See, e.g.*, Tex. R. Civ. P. 39, 40, 42, 48, 51, 166b through 169, and 187 through 215.

Modern manufacturers face other powerful deterrent forces created by laws that did not exist when punitive damages were applied either at common law or at the start of this century. For example regulatory agencies now contribute to deterrence by adding to the costs manufacturers can expect to incur if they sell defective products. Various federal and state administrative agencies regulating thousands of products have the power to require recalls and warnings and to impose civil penalties.

These factors, and many others, indicate that punitive damages today are justifiable in far fewer instances and that the risk of arbitrary, discriminatory, or excessive punitive awards needs to be protected against more closely than in earlier times.

The novel features introduced below by the Supreme Court of Appeals of West Virginia increase the risk of arbitrary, discriminatory, and erroneous punishment even more than in other jurisdictions. Thus, for example, by allowing the propriety of a punitive damages award to turn on whether a corporate defendant's employees "failed to conduct themselves as gentlemen" or were "really mean," rather than "really stupid," the court both reduced to a new low level—ungentlemanliness—the culpability that can support a punitive award and introduced a new high level of ambiguity and uncertainty as to what justifies punishment in the eyes of the law.[3]

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[3] In addition, the court's contention that much higher punitive damages awards are needed to deter "really mean" defendants than are needed to deter "really stupid" defendants is illogical, especially in a commrcial context such as this case. Presumably, a "really stupid" person is one whose rational thought processes are substantially below the average and who therefore will not "get the message" from a small punitive award. A "really mean" person, on the other hand, presumably is one who, in a commercial context, carefully and coldly calculates what type of conduct, tortious or not, will maximize his own profits. As long as the law assumes that any ill-gotten gain will be taken from him in the form of compensatory damages, no punitive damages at all will be needed to deter him. If punitive damages are needed, it is only to offset the probability that compensatory damages might not be awarded, or might not be large enough to deprive him of his profit. Larger punitive damages

In addition, by making it a primary purpose of punitive damages to force settlement decisions to "be made by upper management employees," the West Virginia court invites juries to punish a corporation on the basis of the number of employees and decisionmaking layers it has. Under that theory, presumably, the lower the level of the employee who committed the wrong, the greater the punitive damages should be in order to force the issue up through more layers of management.

By holding that punitive damages should now be used to force defendants to settle lawsuits, the West Virginia court also introduces a punitive damages purpose that necessarily will have a chilling effect on defendants' exercise of their right to access to the courts, to argue novel theories of law, and to argue for changes in existing law. It also will turn every punitive damages case into one that requires a trial of the parties' settlement efforts, contrary to common law punitive damages proceedings and contrary to the general rule against the admissibility of settlement negotiations. *See, e.g.*, Fed. R. Evid. 408; W. Va. R. Evid. 408.

West Virginia increases the risk of excessive punishment still further by evaluating the propriety of a punitive award not on the basis of the harm that the defendant's act caused or threatened to cause, but on the basis of the cumulative harm that "[t]he type" of action "could potentially cause . . . to the other victims" if repeated in the future. That approach completely frees the evaluation from its historical and logical mooring—what is needed to deter a single such act—and encourages juries to punish in advance for an undetermined aggregation of possible future acts.

West Virginia's most harmful departure from the historical approach, however, is its allowing the size of a punitive award to turn not on the basis of the financial

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may be necessary for the "really mean" perpetrator of a personal tort, such as assault, battery, or slander, who gains psychic satisfaction, rather than monetary profit, from committing the wrong, but that was not the situation in this case.

gain realized from the specific misconduct of the specific defendant, but on the basis of the overall wealth of a parent company.

The financial evidence thus admitted in West Virginia is not limited to *relevant* financial information. Instead, the evidence allowed can be the entire net worth of a parent company and its subsidiaries. That number is likely to include assets derived from and dedicated to numerous other business activities of the defendant. That number also often includes assets derived from activities in other states and other countries, in many of which the conduct in issue might not even be tortious, criminal, or otherwise wrongful. Thus, the jury is implicitly instructed to base the severity of punishment in large part on assets derived from the defendant's activities that are considered nondefective and societally beneficial.

In addition, the net worth evidence in West Virginia is not admitted to *limit* the punishment so as to prevent bankruptcy. Instead, it is admitted to *increase* the punishment based on the defendant's status.

The prejudicial effect of evidence of the wealth of a large organization can hardly be overstated. As this Court observed in explaining why punitive damages should not be permitted against a municipality, "The unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981).

That same prejudicial impact is even more likely to attend evidence of the wealth of a company whose annual income greatly exceeds the income of a vast multitude of municipalities. Jurors who vote to award huge damages against their own municipality are likely to be aware that they themselves will have to shoulder a share of the taxes needed to pay the judgment, and they may temper their verdict accordingly; but most jurors who vote to award huge sums against a private manufacturer are likely to believe that, unless they buy the product in issue, they will not incur any of the direct cost of the

juudgment.[4] Even further, a jury's inclination to redistribute wealth is likely to be exacerbated by knowledge that the wealth will be redistributed from an out-of-state or foreign corporation to a local citizen.

The unacceptability of these prejudicial effects of net-worth evidence is sharpened by the now widely recognized fact that a defendant's net worth is irrelevant to the determination of the appropriate punishment under any recognized theory of deterrence or retribution. *See, e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Studies 415 (1989); Dobbs, *Ending Punishment in 'Punitive' Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 870-85 (1989); Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989).

The increased risk of arbitrary, discriminatory, and excessive punitive damages awards caused by all of these departures from the historical approach is not just theoretical. As researchers for the RAND Institute for Civil Justice have found, "Corporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards," and "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings iii*, 50 (1987). "Juries also award more money where the defendants are institutions or organizations rather than individuals—the 'deep pocket' effect . . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

[4] Of course, to the considerable extent that unpredictable, huge punitive awards against some defendants cause all businesses to increase their insurance, their reserves, and their prices, all consumers, including jurors, indirectly pay for unjustified punitive awards.

Further proof of the effect of the many departures from the common-law approach is that the frequency and size of punitive damages awards has skyrocketed as these departures have occurred. An analysis of jury verdicts in the United States, prepared by the RAND Institute for Civil Justice, shows the growth in the average award in the types of tort litigation that manufacturers commonly face "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent" from the period 1960-1964 to the period 1980-1984. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987). Indeed, a recent study funded by plaintiffs' personal injury lawyers, in an attempt to show the *absence* of such an explosion, revealed that the frequency of punitive damages awards in product liability cases alone mushroomed by almost *2000 percent* between 1965 and 1990. *See Demystifying Punitive Damages in Products Liability Cases* 25 (1991) (7 awards for 1960-1965; 151 awards for 1985-1990).

Before 1970 there was only one reported appellate court decision in the entire United States upholding an award of punitive damages in a product liability case—an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by *in the State of Texas alone* without a multi-million dollar punitive damages verdict against some company.[5]

[5] *See, e.g.*, the following examples of the many recent multi-million-dollar punitive damages verdicts under Texas law: *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (applying Texas law) ($6.1 million punitive damages award affirmed); *General Chem. Corp. v. De la Lastra*, 815 S.W.2d 750 (Tex. Ct. App. 1991) ($30 million punitive damages verdict affirmed); *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. Ct. App. 1991) ($15 million punitive damages award reduced to $660,000); *Havner v. Merrell Dow Pharmaceuticals Inc.*, 19 Prod. Safety &

C. Unlike the Alabama Punitive Damages Approach Approved in *Haslip*, the West Virginia Approach Fails to Provide Procedural Safeguards Necessary to Cure the Imbalance Caused by the Modern Departures from the Common-Law Approach

In *Haslip* this Court canvassed the combination of procedural safeguards provided by Alabama to ensure that "discretion is exercised within reasonable constraints," that there is "meaningful and adequate review by the trial court," and that appellate review "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." 111 S. Ct. at 1044, 1045. That multi-level combination of safeguards was reasonably sufficient to restore the historical balance between defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution. In short, those safeguards "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045.

Liab. Rep. (BNA) 1134 (Tex. Dist. Ct. Oct. 3, 1991) ($30 million punitive damages award); *Shears v. Caterpillar*, 19 Prod. Safety & Liab. Rep. (BNA) 1050 (Tex. Dist. Ct. Sept. 9, 1991) ($5.85 million punitive damages award); *Lopez v. Westinghouse Elec. Corp.*, 19 Prod. Safety & Liab. Rep. (BNA) 862 (Tex. Dist. Ct. July 31, 1991) ($10 million punitive damages verdict); *Bliskey v. Berry Property Mgt., Inc.*, 34 A.T.L.A. Law Reporter 354 (Tex. Dist. Ct. May 16, 1991) ($5 million punitive damages award); *Simmons v. State Farm Fire & Casualty Co.*, 34 A.T.L.A. Law Reporter 306 (Tex. Dist. Ct. Mar. 1, 1991) ($2 million punitive damages award); *Lemon v. Missouri Pac. R.R.*, 34 A.T.L.A. Law Reporter 229 (Tex. Dist. Ct. Feb. 7, 1991) ($10 million punitive damages award); *Flores v. Kings Park Apartments*, 34 A.T.L.A. Law Reporter 190 (Tex. Dist. Ct. Nov. 9, 1990) (awarding 10 test plaintiffs approximately $5.25 million in punitive damages); *Ward v. Exxon Corp.*, Texas Lawyer, No. 26, 1990, p. 16 (Tex. Dist. Ct. Nov. 5, 1990) ($5 million punitive damages award); *Parker & Parkley Petroleum Co. v. Dresser Indus.*, Texas Lawyer, Dec. 10, 1990, p. 28 (D. Tex. Oct. 26, 1990) ($100 million punitive damages award); *Waite v. Dean Witter Reynolds, Inc.*, 34 A.T.L.A. Law Reporter 66 (Tex. Dist. Ct. Aug. 3, 1990) ($16 million punitive damages award).

Although West Virginia, as shown above, has chosen to increase beyond historical levels the risk of arbitrary, discriminatory, and excessive punishments in more ways than had Alabama, it has failed to put into place either Alabama's balancing safeguards or their substantial equivalent. As a result, West Virginia's system has significantly upset the historical balance that due process requires to be preserved.

Central to *Haslip*'s finding of the required balance was the Alabama safeguard, at the jury trial level, requiring that "[a]ny evidence of [the defendant's] wealth was excluded from the trial . . . ." 111 S. Ct. at 1044. The Court emphasized that, because of that rule, "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045.

In West Virginia, exactly the opposite is true. Not only is the *defendant's* wealth placed before the jury, but the *parent corporation's* wealth is placed before the jury. Not only is that prejuudicial evidence placed before the jury, but the jury is told that it "*should* take into consideration . . . the wealth of the perpetrator." Not only is the jury directed to consider such wealth, but it is misinformed that "to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances." (Respondents' Brief in Opposition to Petition for a Writ of Certiorari, Appendix B (emphasis added).)

Also central to *Haslip*'s finding of the required balance was the Alabama safeguard, at the level of trial-court review, requiring trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." 111 S. Ct. at 1044. This requirement not only ensured that trial court review would actually occur, but also enabled appellate courts to scrutinize the trial court's reasoning and thereby to conduct meaningful appellate

review. Several factors were specified as "appropriate for the trial court's consideration," including (1) the "culpability of the defendant's conduct," (2) the "desirability of discouraging others from similar conduct," (3) the "impact upon the parties," and (4) "other factors, such as the impact on innocent third parties." 111 S. Ct. at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)).

In West Virginia, trial-court review does not provide these safeguards. The trial court is not required to, and in this case did not, reflect in the record its reasons for refusing to disturb a punitive damages verdict. This omission renders impossible any appellate review of the trial court's actual reasoning. Also unlike Alabama, West Virginia has not explicitly required its trial courts to consider the factors specified in *Haslip*.

West Virginia's current safeguards in punitive damages proceedings also fall short of those in *Haslip* at the level of appellate review. *Haslip* plainly reveals this Court's perception that detailed, objective, appellate review of the reasonableness of punitive damages awards played the most significant role in the "panoply of Alabama's procedural protections." 111 S. Ct. at 1046. As shown above, however, the Supreme Court of Appeals of West Virginia instead introduced into its appellate review factors such as "gentlemanliness," "really mean," and "really stupid" that increase, rather than guard against, the risk of arbitrary, discriminatory, and excessive punishments.

II. DUE PROCESS REQUIRES THAT WEST VIRGINIA PROVIDE PROCEDURAL SAFEGUARDS AT LEAST EQUIVALENT TO THOSE APPROVED IN *HASLIP* IN ORDER TO RESTORE THE HISTORICALLY APPROVED BALANCE BETWEEN DEFENDANTS' INTEREST IN RATIONAL DECISIONMAKING AND THE STATES' INTEREST IN APPROPRIATE PUNISHMENT

As shown above (*see* pp. 10-12, *supra*), the ways in which West Virginia has deviated from the historically

approved common-law approach to punitive damages far outnumber the ways in which Alabama and most other jurisdictions have done so. As a result, West Virginia has greatly increased the risk of arbitrary, discriminatory, and excessive punishment. As also shown above (see pp. 24-26, *supra*), West Virginia has failed to provide several of the procedural safeguards that Alabama provides. West Virginia thereby has substantially upset the historically approved balance between defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution.

Although the due process clause does not dictate the particular procedural safeguards that must be provided to restore within reasonable bounds the required balance, either the Alabama safeguards approved in *Haslip* as adequate or their substantial equivalent are the minimum needed to offset West Virginia's departures from the historical approach to punitive damages. Those safeguards —especially the exclusion of evidence of a defendant's wealth, the requirement that trial courts "reflect in the record the reasons for . . . refusing to [interfere]" with a punitive damages verdict, and consideration of specified factors by reviewing courts—fall well within the framework of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), in that they (1) help to protect defendants' private interest in protecting their property against wrongful deprivation; (2) reduce the risk that West Virginia's departures from the common-law approach to punitive damages will wrongly impair that private interest; and (3) reduce the risk in a way that imposes no significant burden on the state and that does not at all impair the state's interest in achieving its legitimate purpose of imposing "punitive damages [that] are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 111 S. Ct. at 1045.

In addition, because West Virginia's departures from the historically approved balance are so much greater than were Alabama's, something more is needed to re-

store the required balance. In *Haslip* this Court recognized that "[t]here is much to be said in favor of a State's requiring, as many do, a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' as in the criminal context." 111 S. Ct. at 1046 n.11 (citations omitted). The Court concluded that due process did not require such a standard *in the Alabama system* because "the lesser standard prevailing in Alabama—'reasonably satisfied from the evidence'—*when buttressed, as it is, by the procedural and substantive protections outlined above*, is constitutionally sufficient." *Id.* (emphasis added). Because West Virginia's system is not buttressed by Alabama's panoply of modern procedural and substantive protections, and instead severely undermines numerous historical protections preserved by Alabama, the "clear and convincing evidence" standard, or an equally effective alternative safeguard, appears to be needed to restore the required balance in West Virginia.

While not dictating exactly which safeguards West Virginia and other states must provide to meet due process, this Court can provide guidance by suggesting additional safeguards that would tend to restore the required balance in a manner consistent with the three-pronged *Mathews v. Eldridge* evaluations. Such safeguards include the following:

Jury Proceedings

1. The defendant in a punitive damages trial should have the right, upon motion, to a bifurcated trial in which the issues of whether and in what amount punitive damages should be awarded are tried only after the jury finds liability on the merits. *See Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). This would enable the trial courts to give more detailed punitive damages instructions, and enable parties to introduce evidence relevant only to the punitive damage issues, without unduly increasing both the risk of prejudice and the length of every trial in which punitive damages are sought.

2. Evidence of a defendant's financial information should be limited to evidence of what monetary gain, if any, the defendant realized by engaging in the allegedly tortious conduct in lieu of the alternative conduct that the plaintiff advocates. In particular, evidence of net worth, total assets, or total annual income should be inadmissible as evidence to increase the appropriate amount of punitive damages. Net worth should be considered only by the court, and only to protect against excessive awards.

3. The jury should be instructed that society would be harmed by, and that the jury must not award, punitive damages in any amount larger than what is reasonably necessary to serve the legitimate deterrent purpose of punitive damages.

4. The jury should be instructed that it must not allow a defendant's corporate nature, residence, or location of offices, or any other aspect of its status to affect either the decision whether to award punitive damages or the decision as to the amount of punitive damages to award.

5. The jury should be instructed that the state's legitimate purposes of deterrence and punishment are served equally by dollars awarded as compensatory damages and by dollars awarded as punitive damages, and that no punitive damages should be awarded if the compensatory damages are adequate to provide the minimum necessary deterrence and retribution.

6. When the tortious conduct is also subject to statutory civil or criminal penalties, the jury should be told of the amounts that the legislature has specified as appropriate for deterrence and punishment of such conduct.

Trial Court Review

1. As in Alabama, trial courts should be required to reflect in the record their reasons for upholding or refusing to uphold a punitive damages verdict.

2. As in Alabama, trial courts should be required to consider the factors listed in *Haslip* as appropriate for judicial review. The parties should be permitted to introduce evidence relevant to those factors in a post-jury-trial evidentiary proceeding. Only in this manner will

defendants be able, as a practical matter, to obtain due consideration of the deterrent effects of criminal sanctions, other punitive damages awards, other compensatory damages awards, and regulatory sanctions, because evidence of that nature could not be shown to a jury without generating prejudice on other issues. *See, e.g.*, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 295 (1983); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158, 1174 (1966).

Appellate Review

1. Appellate courts should be required to determine independently whether the punitive damages award was reasonably necessary to promote the legitimate deterrent and retributive purposes of punitive damages. *See Haslip*, 111 S. Ct. at 1045.

2. Appellate courts should be required to consider the factors listed in *Haslip* as appropriate for judicial review, including evidence introduced in any post-jury-trial evidentiary proceeding before the trial court.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

VS.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for a Writ Of Certiorari to the Supreme Court of Appeals of West Virginia

AMICUS CURIAE BRIEF OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

AUTHORITY TO FILE *AMICUS CURIAE* BRIEF

The parties have consented to Continental Casualty Company filing this *amicus curiae* brief. The letters of consent are on file with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

Continental Casualty Company, a Chicago-based insurance company, is interested in the subject matter of this

petition because of the tremendous adverse effect that pending and future punitive damage awards could have on the company as a result of litigation nationwide against Continental's insureds. Continental is particularly concerned with litigation involving its insureds who manufactured asbestos products. Because punitive damages are, in some instances, passed on to insurers, Continental could ultimately be held liable for hundreds of millions of dollars of punitive damage awards in asbestos cases.

SUMMARY OF ARGUMENT

In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court recognized that punitive damages are properly the subject of due process scrutiny. Yet since the Court issued that opinion, courts nationwide have concluded that in reality there are no limits to the discretion of juries and courts in awarding massive punitive damage awards bearing no reasonable relationship to the injury suffered by the plaintiff. The case currently before the Court well illustrates this state of affairs.

Amicus curiae Continental Casualty Company files this brief because any attempt to better define the due process standards appropriate to punitive damage awards must be formulated taking into account what is today perhaps the most troubling application of punitive damages — in mass tort litigation. Mass tort litigation involves injury to many individuals from a single act or course of conduct by the defendant. Products liability actions, such as asbestos-related litigation, are the most prevalent form of mass tort litigation, although it also includes various types of accidents (such as plane crashes) and environmental hazards.

Multiple awards of punitive damages in mass tort cases result in a defendant being punished over and over again for the same conduct. The result has aptly been described by jurists and commentators alike as "overkill," with widely shared agreement that such overkill violates the due process rights of defendants subjected to it. Not surprisingly, such overkill has rendered some

defendants insolvent and threatens numerous others with that fate, even though presumably no individual jury or court intended such a result. Perhaps more importantly, payment of punitive damage awards to plaintiffs who happen to sue earlier can prevent later payments of compensatory awards. Because such awards are rendered in different state and federal jurisdictions, no single appellate court, other than this Court, is in a position to review the reasonableness, or unreasonableness, of their aggregate effect.

The capricious effects of this phenomena are nowhere more apparent than in the nationwide mass tort litigation involving asbestos. With well over 100,000 claims already filed, and hundreds of thousands more such claims expected before the year 2050, the effects of the liability from compensatory damages alone has been formidable. When repeated awards of punitive damages, as much as several hundred million dollars in a single class action, are heaped on top of the compensatory awards, it is not surprising that more than a dozen asbestos manufacturers already have been driven into bankruptcy. Those that remain cannot possibly pay all valid compensatory claims as well as the huge multiple awards of punitive damages. As a result, many valid compensatory claims will go unpaid, while other claimants will walk away with massive windfalls from punitive awards. Moreover, the punitive and deterrent purpose of such awards is difficult to see when the manufacture of asbestos ceased long ago, and the only persons in fact punished are current employees and owners, as well as trade creditors and customers, who had nothing to do with the wrongful acts complained of.

Lower courts, although recognizing the due process concerns here, have felt themselves powerless to resolve them because they face litigation that is nationwide, with no single source of oversight, other than this Court. Any due process limitations imposed upon punitive damages by one jurisdiction can be, and are, ignored in others. Only this Court can meaningfully impose the necessary constitutional limitations on the lower courts, such as a requirement that a defendant not be

subjected to more than one punitive damages award for a single act or course of conduct.

In sum, Continental Casualty Company respectfully requests that the Court establish meaningful due process limitations on the award of punitive damages, and that in doing so it take into consideration the pervasive problems posed by the award of punitive damages in mass tort litigation.

ARGUMENT

I

THIS CASE ALONE ILLUSTRATES THE CONTINUING NEED FOR THIS COURT TO ENUNCIATE MEANINGFUL DUE PROCESS LIMITATIONS ON PUNITIVE DAMAGE AWARDS

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court expressed its concern with "punitive damages that 'run wild,'" and it recognized that substantive due process considerations under the Fourteenth Amendment required that "punitive damages [be] reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1043, 1045. The Court thought it sufficient in *Haslip* that (1) the jury was told to take into account the character and degree of the wrong and the necessity of preventing a similar wrong, (2) the trial court reflected in the record the reasons for refusing to interfere with the jury verdict, and (3) the appellate court applied detailed substantive standards to ensure that the award did not exceed an amount that accomplished society's goals of punishment and deterrence. *Id.* at 1044-45. Although this Court affirmed the Alabama Supreme Court and upheld the punitive damages award in that case, the Court noted that the $840,000 punitive damages award, which was four times the amount of compensatory dam-

ages awarded, was "close to the line" in terms of its constitutional permissibility. *Id.* at 1046.

As the facts of the present case and the briefs of Petitioner and *Amici Curiae* make clear, *Haslip*'s minimal procedural guidelines failed to place meaningful substantive due process parameters upon punitive damages awards. As a result, the Court's opinion failed to stem the flow of outrageous and continually escalating punitive damages awards nationwide. The West Virginia Supreme Court of Appeals in this case, purportedly following the mandate set down in *Haslip*, appears to have had no qualms about affirming a punitive damage award that was 526 times the compensatory damages award. More importantly, as Petitioner and *Amici* have pointed out, this decision is not an aberration. Other courts, after reading this Court's opinion in *Haslip*, have permitted enormous punitive awards unanchored to the actual injury caused by the defendant, and with little or no due process oversight. Petition for a Writ of Certiorari at 13 & nn.10, 11; Brief of *Amici Curiae* American Petroleum Institute and National Association of Manufacturers in Support of Petition at 7-10.

For this reason alone, Continental joins with Petitioner and *Amici Curiae* supporting Petitioner in urging the Court to further define and refine due process limitations upon punitive damage awards. Continental urges this Court to provide the courts nationwide with due process standards that meaningfully control the present unfettered discretion exhibited by many of those courts in awarding, and affirming awards of, punitive damages.

II

THE LACK OF SIGNIFICANT DUE PROCESS RESTRICTIONS ON PUNITIVE DAMAGES IS PARTICULARLY DEVASTATING IN THE CONTEXT OF MASS TORT LITIGATION, WHERE PUNITIVE DAMAGES REPEATEDLY ARE AWARDED AGAINST THE SAME DEFENDANT FOR THE SAME CONDUCT

Punitive damage awards in an individual case, such as the case before the Court, frequently are deeply troubling because of their tendency to inflict severe, punitive harm to a defendant that is entirely out of proportion to the injury suffered by the plaintiff. The problems raised by such awards are magnified tremendously when the same defendant is independently assessed punitive damages awards in multiple proceedings for the very same conduct. This now commonly occurs in so-called "mass tort" litigation, where the same conduct results in injury to numerous individuals, who then sue the defendant, and recover awards, in separate fora. The result can be devastating to a defendant who is assessed punitive damages awards by each of these various courts intended to punish the same conduct. Such "[r]epetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140 (1986).

A. Mass Tort Litigation is Already Overwhelming Some Courts, and It Is a Phenomenon Here to Stay

Mass-tort litigation already is overwhelming some of the nation's courts. "The litany of well-known 'litigation events' arising out of common disasters, product uses, or environmental conditions — such as asbestos, Agent Orange, DES, Dalkon Shield, or skywalk collapses — attest to this phenomenon." Edward F. Sherman, *Symposium on Problems in Disposition of*

Mass Related Cases and Proposals for Change, 10 Rev. of Litig. 209, 209 (1991). Moreover, all indications are that mass tort litigation, although of recent origin, is here to stay. *Id.*[1]

Mass tort litigation, by its sheer magnitude, threatens to deprive the courts of their ability to carry out their intended function. As one scholar recently described the problem:

> Mass-tort litigation has placed the courts under siege. More so than any other single development, the courts' inability to counter the press of this litigation has forced a dramatic reevaluation of the judicial system's ability to "do justice" in any meaningful way.

Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 Rev. of Litig. 463, 463 (1991).

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[1] "Mass tort litigation will continue to preoccupy our legal system. Future technological development will produce not only new, unforeseen risks to public health and safety, but will also increase our ability to identify these dangers after they have caused injuries. Moreover, the experience of lawyers and judges in handling such cases increases the feasibility of future similar litigation and encourages successful plaintiffs' lawyers to identify and pursue claims arising from new areas of mass tortious behavior." Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 Law & Contem. Probs. 227, 227-28 (1991).

B. Punitive Damages in the Mass Tort Context Result in "Overkill," in Violation of the Due Process Rights of Defendants

The "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" was first identified by the federal courts 25 years ago. *See Jeffries, supra*, at 141. In 1967, in the case of *Roginsky v. Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967), the Second Circuit faced one of many requests nationwide for punitive damages in cases involving MER/29, a drug designed to lower blood cholesterol but which, as a side effect, caused cataracts. Although ultimately finding no grounds for punitive damages, Judge Friendly, writing for the court, grappled with due process concerns with awarding such damages in more than one case against the same defendant:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded, these would run in to tens of millions, as contrasted with the maximum criminal penalty of "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."... We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Id. at 839.

Although a number of courts and commentators have struggled with this problem since, *see infra* at 11-13, the current helplessness of lower courts facing this issue is best illustrated by *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989) (*Juzwin I*), and by the court's subsequent opinion vacating its

earlier order, 718 F. Supp. 1233 (D.N.J. 1989) (*Juzwin II*). In *Juzwin I*, a consolidated asbestos-related product liability action, the court, noting the serious problems inherent in the imposition of punitive damages in mass tort litigation, concluded that awarding punitive damages more than once in such a context violated the defendants' due process rights. 705 F. Supp. at 1064

The imposition of punitive damages in the mass tort context, noted the court, magnifies to an extreme degree all of the normal problems inherent in the usual punitive damages case. *Id.* at 1055. These include (1) vague jury standards and excessive jury discretion, (2) imposition of a penalty in a civil matter that may far exceed any penalty provided under criminal statutes, with none of the same safeguards, (3) the possibility of insolvency as a result of such awards, and (4) payment of such penalties to a fortuitous plaintiff rather than to a public treasury. *Id.* As Judge Sarokin explained:

> All of the foregoing defects are exacerbated in mass tort litigation. Defendants can be held liable over and over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter. Although an award in an individual case may be fair and reasonable, the cumulative effect of such awards may not be. Nor is the cumulative effect of such awards reviewable by a single court, since the matters are permitted to proceed and be reviewed separately and independently.

Id.

Such multiple punitive damage awards result in, and continue to threaten, injustice, in many cases on a massive scale. Probably the most commonly recognized problem is that the payment of punitive damages to those who happened to sue earlier can diminish the ability of the defendant even to pay

compensatory damages to later deserving claimants. As Judge Sarokin explained, "If there is a limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated." *Id.* *See* William W. Schwarzer, *Punishment Ad Absurdum*, Cal. Lawyer 116 (Oct. 1991) ("In mass tort cases such as those involving asbestos, the available assets of the defendants may be depleted long before all plaintiffs are compensated. To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair.").

In addition, multiple awards of punitive damages can have the punitive effect of driving businesses into bankruptcy — the corporate equivalent of a death sentence — even though no single court or jury intended or desired that result. John A. Maya, *Punitive Damages and the Mass Tort: An Insurance Alternative to the Consequences of Multiple Liability*, 42 Syracuse L. Rev. 1241, 1253 (1991) ("Punishment, and not annihilation, is the object [of punitive damages].") (quoting *Pease v. Beech Aircraft Corp.*, 113 Cal. Rptr. 416 (Ct. App. 1974) (order granting new trial, Civ. No. 162581 (1971)); *Juzwin I*, 705 F. Supp. at 1055 ("the ability to financially destroy an individual, a business, or an entire industry ... is an awesome power to place in the hands of a jury without limitations or guidelines"). Moreover, the deterrent purpose of punitive damages is lost where the conduct complained of occurred decades earlier and results merely in the punishment of owners or corporate officials who did not participate in that conduct. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 12 Cardozo L. Rev. 1819, 1864 (1992). And if successive fines render a company insolvent, the imposition of punitive damages punishes innocent employees and trade creditors rather than the persons who committed the misconduct.

In light of these intractable problems, Judge Sarokin issued an order stating that the court would dismiss plaintiffs' claims for punitive damages against those defendants "who are able to present competent proof that liability for punitive damages has already been imposed upon them for the conduct

alleged to be the basis of a punitive damage claim in this action." *Id.* at 1065.

Numerous jurists have agreed with Judge Sarokin's reasoning in finding that punitive damages awarded in the mass tort context threaten the defendants' due process rights under the Fourteenth Amendment. *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.) (finding strong arguments why "the courts [should] shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), *cert. denied*, 479 U.S. 852 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *In re Agent Orange Product Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("In theory, ...when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit either as a matter of policy or as a matter of due process to the amount of times defendants may be punished for a single transaction."); *In re Northern Dist. Cal. Dalkon Shield IUD Products Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *But see Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) (finding no *procedural* due process problem because "the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all of the procedural safeguards to which it is due"), *cert. denied*, 478 U.S.

1021 (1986); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 281-87 (D.N.J. 1989) (finding merit in "overkill" argument but no evidence that defendants in case faced bankruptcy).

Similarly, commentators almost uniformly have agreed that multiple awards of punitive damages for the same conduct create or threaten serious injustice. *See, e.g.*, John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154 (1986) ("Limiting aggregate punitive awards is a straightforward application of an ancient and settled principle of Anglo-American justice. That principle condemns excessive monetary penalties, whether civil or criminal. More specifically, it requires, at a minimum, that monetary penalties be limited in amount so as not to threaten the defendant's economic viability.");[2] Dennis Neil Jones, *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 3 (1991) ("[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause. The aggregate effect of such awards may reach far beyond their purpose to punish and

[2] Part of the rationale in *Haslip* for affording the jury considerable discretion in awarding punitive damages there does not apply when mass tort litigation is involved. In *Haslip* the Court stated: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." 111 S. Ct. at 1043 (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)); *see also* 111 S. Ct. at 1046 (Scalia, J., concurring in the judgment). Although, as Professor Jeffries explains, the argument for *containing* excessive punitive damage awards has been around for a long time, he points out that awards of punitive damages in mass tort cases are very new, and hence do not deserve the presumption of validity associated with longevity. Jeffries, *supra* at 140 ("the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience.").

deter, becoming what has been coined 'overkill.'"); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983) ("The recent unprecedented number of multiple punitive damages verdicts in mass tort cases has raised again the spectre of overkill recognized by Judge Friendly in *Roginsky*.") Note, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 Pac. L.J. 1273 (1982); Note, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797 (1979).

C. The Asbestos Cases Best Illustrate the Current and Potential Future Dimensions of the Problem

Nowhere are the problems caused by multiple awards of punitive damages more acute now than in the lawsuits, such as the *Juzwin* case itself, arising out of asbestos-related bodily injury and property damage. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335 (5th Cir. 1985) (Clark, C.J., dissenting) ("No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure.").[3] Cases grappling with claims

[3] "No litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an 'impending disaster' — a crisis situation. Even though 100,000 claims have already been resolved, 100,000 new claimants now seek compensation. For each claim resolved, two to three new claims are being filed. More than a dozen major defendant companies have been driven into bankruptcy, thereby reducing the size of the asset pool available to compensate the severely injured. The seeming unending growth in the number and valuations of claims

(continued...)

for asbestos-related bodily injury and property damage showcase and highlight the fundamental problems that arise when courts and juries are permitted repeatedly to heap punitive damage awards on top of already large compensatory damage awards.

As the Court undoubtedly is well aware, the number of asbestos claims is huge and ever growing. According to one scholar, "[o]ver 150,000 asbestos-related claims were filed by 1991, and it is estimated that 2,000 new cases are filed each month." Joseph M. Pastore III, *The Uncertain Future of the Class Action Suit in School Asbestos Litigation*, 8 Pace Env. L. Rev. 667, 667 (1991). In a recent report by Eric Stallard and Kenneth Manton for the Duke University Center for Demographic Studies entitled *Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants*, 1990-2049 42 (Draft November 30, 1992), the authors estimate that between 1990 and 2049 there will be 560,301 asbestos-related claims. These numbers already overwhelm the nation's state and federal courts and will continue to do so well into the 21st Century. *See* Linda S. Mullenix, *Problems in Complex Litigation*, 10 Rev. of Litig. 213, 214 (1991) ("Asbestos litigation has become the federal court system's Sisyphean task: no matter how efficiently the courts push asbestos lawsuits through the system, more cases are filed in the courts without signs of respite."); *accord* Brickman, *supra*, *passim* (describing how every attempt by courts to reduce the asbestos backlog has in fact made it easier for plaintiffs' attorneys to file even more asbestos claims).

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[3](...continued)
that courts and juries are producing will inexorably lead to additional defendants' bankruptcies. Those who peer into the future see an estimated cost to defendants ranging from thirteen to thirty billion dollars — valuations wholly inconsistent with the continued solvency of most currently named defendants." Brickman, *supra*, at 1819-20.

The wrongful conduct at issue in punitive damages claims against asbestos manufacturers occurred roughly between 1930 and 1960, when it is alleged that *some* asbestos manufacturers tried to suppress the dangerous character of asbestos fibers. *See* Paul Brodeur, *Outrageous Misconduct, The Asbestos Industry on Trial* (1985). Indeed, asbestos was taken off the market in 1971. *Id.* The punitive damage awards, however, are being, and apparently will continue to be, assessed from now on through the year 2049. Stallard & Manton, *supra*, at 42. This means that corporate defendants already are being "punished" — again and again — for conduct that occurred 30 to 60 years ago. Before the claims terminate, punitive damage awards will be meted out for conduct that is over a *century* old, when no one will be alive who had anything to do with the relevant decisions.

The combination of compensatory and punitive damages already has led to bankruptcy proceedings for at least 15 asbestos manufacturers. Brickman, *supra*, at 1819 & n.2. The increasing imposition of punitive damages thus hurts two classes of innocent parties. First, they wipe out funds that otherwise would be available to pay compensatory damages to deserving plaintiffs in the future. Brickman, *supra*, at 1867; *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, C.J., dissenting). Second, punitive damages punish current corporate owners and officials, as well as employees, customers and trade creditors, who took no part in, and had absolutely no knowledge of, the wrongdoing.

History shows that the punitive damages awarded in a single case can be enormous. Already hundreds of millions of dollars have been awarded in punitive damages against asbestos defendants. Brickman, *supra*, at 1867-68 & n.198. In one case alone, *Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990), for instance, where the court consolidated 2300 claims for one "trial" in the Eastern District of Texas, the court imposed punitive damages across the board using a multiplier for each defendant that levied punitive damages by an amount that was 1.5 to 3 times the compensatory damages for each defendant. The average compensatory award to individual plaintiffs in that

case exceeded $500,000. As a result, the resulting punitive damages award alone was several hundred million dollars.

D. Lower Courts Are Powerless to Solve the Problem

Six months after publishing his opinion in *Juzwin I*, Judge Sarokin, on a motion for reconsideration, issued a second opinion (*Juzwin II*) vacating the first. 718 F. Supp. 1233. In that opinion he refused to back down from his conclusion that multiple awards of punitive damages in the mass tort context were an unconstitutional violation of due process. *Id.* at 1236. He concluded, however, that "[u]ntil there is uniformity either *through Supreme Court decision* or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated." *Id.* at 1235 (emphasis added). In the end, the court vacated its previous order because, although it had identified a clear constitutional wrong, it felt itself powerless to provide a meaningful remedy. The court's jurisdiction was limited by the borders of New Jersey, and it had no way to ensure that the parties' due process rights were protected in every court they entered. Hence, Judge Sarokin could not be sure what amount of punitive damages, if any, was appropriate in his court. *Id.*

Courts, including the *Juzwin* court, have recognized several other possible solutions to the problems posed by punitive damage awards in mass tort cases besides the solution proposed, and ultimately rejected, by Judge Sarokin. However, each such "solution" has been deemed unattractive for one reason or another.

One possibility is to inform the jury of the number of times a party already has been held liable for punitive damages. But this "requires a defendant to advise the jury that prior juries hearing the same evidence have already found that the defendant's conduct was so egregious as to warrant punitive damage awards." *Juzwin*, 705 F. Supp. at 1056. This has uniformly been deemed an undesirable option for a rational

defendant, who risks the likelihood that a jury will simply consider such evidence additional proof that punitive damages are appropriate. *Id.* *See* Jeffries, *supra*, at 146 ("this supposed protection for the defendant would obviously 'backfire' if, as seems inevitable, the jury takes a history of prior awards as evidence of liability in the instant case").

Another alternative would be for trial courts to monitor awards and, after accepting evidence of prior penalties in other forums, appropriately reduce the award. But as the *Juzwin* court pointed out, "the parochial concerns of the courts of the various states and the vague guidelines for justifying a judicial determination of 'excessiveness' of awards ... render this remedy an ineffectual alternative." *Id.* at 1056 n.1. As Professor Jeffries elaborates:

> The court that denies an additional award on the ground that the defendant has been sufficiently punished by previous judgments has no guarantee that other courts will follow suit.... [T]he most that an individual state can do is to adopt a self-denying ordinance that would succeed only in disadvantaging its own citizens relative to claimants in less responsible jurisdictions. The likelihood would be just the opposite — that a kind of competition will develop to show that Texas plaintiffs (and their lawyers) are just as entitled to riches as their California counterparts.

Jeffries, *supra*, at 146; *accord* Brickman, *supra*, at 1827 ("In the highly mobile asbestos-claims market, the efforts of one jurist to undo the perverse incentive structure is easily countered by other jurists not similarly inclined.")

Judge Jack Weinstein was successful in using a mandatory class action to solve this problem for the claims

arising out of Agent Orange, *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983); however this solution was never challenged on appeal, as the parties settled, *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Appellate courts have rejected such class action devices in suits involving IUDs, *In re Northern Dist. Cal. Dalkon Shield IUD Products Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), and the collapse of the Marriot skywalk in Kansas City, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). Such a class action for asbestos cases was expressly found to be unworkable in *In re School Asbestos Litigation*, 789 F.2d 996, 1005-07 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986), primarily because the filing of new asbestos claims is forecast to continue for years into the future, and any such class would therefore necessarily be under-inclusive. *See also Juzwin I*, 705 F. Supp. at 1063 (noting that class action device not available in asbestos cases).

E. Due Process Requires that a Defendant Face No More than One Punitive Damage Award for a Single Act or Course of Conduct

Faced with the inherent limitations of his geographic jurisdiction, Judge Sarokin in *Juzwin II* recommended that this Court adopt the following national standards for dealing with punitive damages claims generally:

> 1. A full and complete hearing must be held, after adequate time has elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence is presented regarding the conduct of the defendant against whom the claim is made;

> 2. Adequate representation is afforded to the plaintiff, with an opportunity for plaintiffs similarly situated and their counsel to cooperate and contribute towards the presentation of the punitive damages claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct.
>
> 3. An appropriate instruction to the jury that their award will be the one and only award of punitive damages to be rendered against the company for its wrongful conduct;
>
> 4. Such other conditions as will assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.

718 F. Supp. at 1235.

While recognizing that the case before the Court does not involve mass tort litigation, Continental Casualty Company nevertheless believes that Judge Sarokin's proposed guidelines are useful for this Court to bear in mind when deciding general due process parameters for punitive damage awards. Although many punitive damages claims arise outside the mass tort context, the Court in formulating general due process guidelines for punitive damage awards must do so fully cognizant of their potential effect upon that body of cases where punitive damages raise the most urgent due process concerns. At a minimum, this Court should make clear that it violates a defendant's fundamental due process rights to be assessed punitive damages more than once for the same act or course of conduct. Without this minimal level of protection, courts and juries will continue to hand down an increasing number of punitive damage awards that unfairly strike their target for the second, tenth or ten thousandth time.

CONCLUSION

The decision of the West Virginia Supreme Court of Appeals should be reversed.

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January 22, 1993

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No. 91-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF PUBLIC CITIZEN

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, a non-profit public interest organization with a membership of over 140,000 consumers. Public Citizen is committed to protecting consumers from dangerous products and fraudulent and unfair trade practices. An effective tort system that compensates victims and punishes wrongdoers is an essential means to that end. Within the tort system, punitive damages play a central role in deterring manufacturers of products and providers of services from deliberately or recklessly engaging in behavior that harms consumers.

A central issue in this case is whether substantive due process limits the amount of punitive damages that may be awarded in any given case. On this point, petitioner has argued that punitive damages must bear a "reasonable relationship" to compensatory damages, measured according to an unspecified "range of appropriate multipliers." Numerous *amici* have also urged the Court to limit punitive damages to some specific multiple of compensatory damages (*e.g.*, three-to-one or four-to-one).

Public Citizen submits this brief to explain that any decision that compels the states to establish fixed ratios for punitive damages would harm consumers and undermine important state interests.

SUMMARY OF ARGUMENT

Requiring a proportional relationship between compensatory and punitive damages would harm consumers by undercutting legitimate state goals of deterrence and retribution. Regarding the former, punitive damages deter misconduct that, although arguably rational from the perspective of the individual wrongdoer, has serious social costs. This deterrent function is especially important in cases involving consumers, where total compensatory damages are often small in relation to total anticipated profit from a course of wrongdoing. In such cases, limiting punitive damages to some fixed multiple of compensatory awards would weaken deterrence by permitting wrongdoers to profit from their misdeeds or calculate in advance the cost of their misconduct.

Punitive damages also perform a retributive function by punishing especially egregious and socially undesirable behavior. Limiting punitive damages in any given case to a set multiple of compensatory damages would frustrate this goal in two ways. First, in circumstances where only a few members of a class of victims are able to sue and recover damages from a particular wrongdoer,

compensatory damages (or any small multiple thereof) will not reflect the wrong inflicted on society as a whole. Second, in cases where a defendant behaves especially maliciously, but fortuitously causes only minor injuries, a proportionality rule would prevent the punishment from fitting the crime.

For these reasons, injecting a proportionality requirement into the Due Process Clause of the Fourteenth Amendment would drastically weaken the protections for consumers afforded by the tort system. Consistent with established principles of substantive due process, only punitive awards that bear no rational relation to deterrence and retribution could conceivably be said to overstep constitutional boundaries.

ARGUMENT

LIMITING PUNITIVE DAMAGES TO SOME MULTIPLE OF COMPENSATORY DAMAGES WOULD HARM CONSUMERS BY UNDERMINING DETERRENCE AND RETRIBUTION IN CERTAIN CASES.

At the outset, we note that this Court has never invalidated a punitive damage award on substantive due process grounds. For purposes of this brief, however, we assume that the due process clause of the Fourteenth Amendment places some substantive limits on punitive damage awards distinct from the procedural protections announced by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991) ("*Haslip*").

Petitioner argues that this Court should apply standards of "fundamental fairness" to determine whether the punitive award against it violates substantive due process. The fundamental fairness determination, in

petitioner's view, should include an inquiry into the relationship between compensatory damages and the amount of the punitive award. Taking its cue from *Haslip*, where this Court suggested that a punitive award of four times compensatory damages might be "close to the line," 111 S. Ct. at 1046, petitioner argues that the punitive damages award in this case, which was more than 500 times the compensatory award, cannot withstand constitutional scrutiny.

This brief explains why the substantive component of the due process clause, whatever its contours, cannot reasonably be said to require a fixed proportional relationship of any sort between compensatory and punitive damages. This Court has repeatedly recognized that deterrence and retribution are legitimate state goals sought to be advanced by imposition of punitive damages. *See Haslip*, 111 S. Ct. at 1044, 1059, 1064; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *Memphis v. Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974). Yet, as explained below, imposing a fixed ratio on punitive damage awards would actually work *against* deterrence and retribution in many cases, especially those involving consumers. There is no basis in law or logic for imposing a substantive due process standard that would substantially undercut states' ability to deter and punish deliberate or grossly reckless behavior that is particularly harmful to consumers.

1. Deterrence. To explain why a strict proportionality rule would undermine the deterrent effect of punitive damages in consumer cases, we begin by adopting *arguendo* petitioner's claim that, "[i]f every tort were detected and penalized, no punitive award would be necessary to further the State's deterrence goal." Pet. Brief at 28-29. Here, the theory is that a perfectly functioning tort system, in which all victims sue and

recover full compensatory damages, would eliminate misconduct on its own, thereby rendering punitive damages unnecessary.

As petitioner itself recognizes, however, our tort system is highly imperfect, in that many victims are not able to sue and recover damages. That being the case, wrongdoers are often in a position to profit from their misdeeds — unless, of course, they are required to pay damages that reflect not only the harm inflicted on victims who litigate and prevail, but also the harm incurred by non-litigating victims who, for lack of resources or knowledge, or for other reasons, do not pursue their valid claims. This is where punitive damages come into play, by deterring misconduct that might otherwise yield a profit at society's expense.

Limiting punitive awards to a set multiple of compensatory damages would undermine this deterrent function in a number of ways. Take an example where only one in 20 victims is able to sue and prevail against a particular defendant. If compensatory damages in that one case were large in relation to the total anticipated profit from harming the entire class of victims, a small multiplier might be sufficient to permit optimal deterrence. However, if the one litigating victim were to receive a small compensatory award relative to total profit, a large multiplier would be necessary. Thus, imposing a set ratio as a ceiling on *all* punitive damage awards would create non-optimal results (*i.e.*, underdeterrence) in cases where total compensatory damages are small in relation to total anticipated profit.[1]

---

[1] To prevent over-deterrence from multiple punitive damage awards, reviewing courts may properly consider "the financial condition of the defendant" and "the existence of other civil awards against the defendant for the same conduct . . . ." *Haslip*, 111 S. Ct.

(continued...)

This proposition has important implications in the context of torts affecting consumers, where large punitive awards are often essential to achieve optimal deterrence. The first reason is that consumer cases often involve situations where the harm to any particular victim is slight, but there exists a risk that the wrongdoer will inflict that slight harm on a wide number of others. Given that few individuals are likely to pursue redress under these circumstances, effective deterrence requires that wrongdoers face the possibility of being assessed punitive awards substantially in excess of actual damages in those few cases where victims do sue and prevail. *See* Vargo, *Prod. Liab. Pract. Guide* § 18.02[4] (Matthew Bender 1993) (forthcoming) ("[p]unitive damages are particularly useful in situations where large numbers of individuals have been slightly or moderately injured by a defective product"); *Wangen*, 294 N.W.2d at 452 (noting that punitive damages may be necessary to encourage bringing of claims in product liability cases where injuries are moderate or minor).

A prime example outside the product liability context is insurance bad faith tort actions, where compensatory damages alone are often not of sufficient magnitude to make it economically feasible for a lawyer to pursue a case. As a result, punitive damages are often the only real deterrent to malicious and oppressive conduct by insurance adjusters. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (upholding punitive damage award of 500 times compensatory damages in case involving wrongful denial of insurance claim); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz.) (upholding punitive

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[1](...continued)
at 1045. *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459-60 (Wis. 1980); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1319 (1976).

damage award of 233 times compensatory damages where, for over 18 years, insurance company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would probably not object), *cert. denied*, 484 U.S. 874 (1987).

In addition, as petitioner correctly observes (Pet. Br. at 29-30), consumer fraud often goes undetected by its victims, thereby further limiting the number of lawsuits faced by any given defendant. In such cases, where the compensatory award is often limited to the contract measure of damages, a particularly large punitive award — one that reflects the profit from inflicting harm on non-litigating victims — is essential to deter further misconduct. *See, e.g., Boise Dodge v. Clark*, 453 P.2d 551 (Idaho 1969) (upholding punitive award of 36 times compensatory award in odometer rollback case on grounds that few purchasers would discover the illegal conduct). *See generally FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 623 (7th Cir. 1989) ("[t]he most straightforward rationale for punitive damages . . . is that they are necessary to deter torts or crimes that are concealable"), *cert. denied*, 494 U.S. 1056 (1990); *Walker v. Sheldon*, 179 N.E.2d 497 (N.Y. 1961).[2]

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[2] In *Walker*, the New York Court of Appeals observed:

> Those who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the

(continued...)

There is another way in which a proportionality rule would harm consumers, even in cases where many or most victims are likely to sue and recover full damages. In the foregoing discussion, we assumed the validity of petitioner's assertion that a perfectly functioning tort system would eliminate the need for punitive damages. The flaw in this theory is that it erroneously assumes that a would-be wrongdoer faced with a tort system that guarantees full recovery to all victims would lack any incentive for wrongdoing. One can easily envision a situation, however, where a manufacturer of a product that is known to cause serious injuries to one out of every, say, 1,000 users determines that the benefits of selling the product outstrip the costs, even assuming full recovery by all victims.

A classic example is the Ford Pinto case, where senior management made the decision to go forward with production of the Pinto in the face of evidence that the design of the fuel-integrity system would expose consumers to serious injury or death. This decision was based on a "cost-benefit analysis" that balanced egregiously undervalued "human lives and limbs against corporate profits." *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 812 (Cal. Dist. Ct. App. 1981); *see also Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980) (punitive damages awarded where manufacturer of flammable pajamas continued to market its product, despite knowledge that there "were economically feasible measures which could have been taken to reduce this danger to a fairly acceptable level"); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (punitive damages

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[2](...continued)
additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.
179 N.E.2d at 499.

awarded where manufacturer continued to distribute television sets known to burst into flames, and to assure customers that they were safe), *cert. denied*, 424 U.S. 913 (1976).[3]

In such cases, punitive damages perform the essential function of deterring reprehensible conduct that, although arguably rational from the standpoint of the particular tortfeasor, has devastating social costs for consumers and for society. Restricting punitive awards to some multiple of compensatory damages would limit this deterrent effect by allowing businesses to factor punitive damages into the cost-benefit equation. As two commentators have observed:

> Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory damages. They must know that their financial existence may be threatened by the evil they contemplate.

Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 St. Mary's L. J. 797, 833 (1987). *See also Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 47 (Alaska 1979) (the threat of multiple punitive damages "forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective . . . or an untested product"). *Cf. Wangen*, 294 N.W.2d at 451 ("[t]he possibility of the manufacturer paying out more than compensatory damages might very well deter those who would consciously engage in wrongful practices and who would

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[3] For an extensive compilation of cases fitting this mold, *see* Vargo, *Prod. Liab. Pract. Guide* § 18.01 (Matthew Bender 1993) (forthcoming).

set aside a certain amount of money to compensate the injured consumer").

The foregoing demonstrates the importance of preserving a flexible approach to punitive awards, especially in consumer cases. As petitioner itself admits, there is no single "rational deterrence-based punitive damage multiplier." Pet. Br. at 30. Rather, for deterrence purposes, the optimal punitive award in any given case will vary according to a number of factors, including the extent to which the injury is concealable, the likelihood that victims will seek redress, and the likely extent of the victims' injuries. Moreover, as explained above, it is essential that potential tortfeasors not be able to calculate in advance the costs of their misdeeds. Thus, as this Court recognized in *Haslip*, states have a legitimate interest in "meaningful *individualized* assessment[s] of appropriate deterrence and retribution." 111 S. Ct. at 1044 (emphasis added). Limiting punitive damages to some set multiple of compensatory damages would impermissibly interfere with this important interest, to the clear detriment of consumers.

2. Retribution. A strict proportionality requirement would also frustrate the retributive function of punitive damages. On this point, petitioner argues that "the 'just desert' rationale of retributive justice inherently limits a retributive penalty to an amount proportional to the wrong inflicted." Pet. Br. at 26. The flaw in this reasoning is that compensatory damages, which petitioner seeks to establish as the touchstone for all punitive awards, often do not reflect the full extent of either "the wrong inflicted" or the reprehensibility of the offense.

Here, again, the consumer example is illustrative. As explained above, there are often special factors at work that inhibit victims in consumer cases from suing and recovering damages against a particular tortfeasor. Assume that only one in 20 such victims sues and prevails.

If punitive damages in that one case were limited to some small multiple of the compensatory award against that single victim, the punitive award would in no way account for "the wrong inflicted" on the majority of the *other* victims, who failed to obtain redress. For this reason, limiting punitive damages to some small multiple of compensatory damages would not ensure that the punishment reflects the gravity of the offense.

A proportionality requirement would also undercut the retributive function of punitive damages in cases where a defendant causes only minor injuries, but acts with ill will or malice requiring substantial punishment, or where a defendant engages in heinous conduct with an enormous potential for harm, but which fortuitously results in little actual harm. In such cases, to use a multiple of compensatory damages is plainly irrational.[4] Petitioner's error, then, stems both from artificially limiting "the wrong inflicted" to the damages suffered by a victim in a single case (an especially unrealistic approach in consumer cases) and from erroneously assuming that compensatory damages provide an appropriate measure of the need for punishment even within the context of a single suit.

Thus, as with deterrence, optimal retribution demands an individualized punitive damage system not bound by mathematical equations. As one court has aptly observed:

> The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to beha-

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[4] As noted by the West Virginia Supreme Court, in cases "in which the potential for harm from the defendant's conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a ratio much greater than five to one were entirely appropriate." JA 889.

> vior, not to results, to determine the need to admonish . . ..

Campus Sweater & Sportswear v. M.B. Kahn Construction Co., 515 F. Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981). This Court, too, should recognize that a formulaic approach to punitive awards would work against legitimate retributive goals and could have disastrous consequences for consumers.

This is not to say that substantive due process is necessarily without force in the context of punitive damage awards. It may be, for example, that a punitive award that clearly exceeds any amount needed to further deterrence or retribution crosses the constitutional line. Such an approach — unlike that urged by petitioners — would accord with traditional notions of substantive due process by ensuring that punitive damages in any given case bear some rational relation to legitimate state interests. *See Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955); *see also Haslip*, 111 S. Ct. at 1045 (punitive awards should be "rational in light of their purpose to punish what has occurred and to deter its repetition"). Adopting a strict proportionality requirement, in contrast, would introduce an element of irrationality into the system by imposing an artificial limit on punitive damage awards that is entirely unrelated to — and often works against — state goals of deterrence and retribution, especially in cases affecting consumers.

CONCLUSION

For the foregoing reasons, the Court should reject the suggestion that substantive due process compels states to establish fixed ratios for punitive damages and affirm the judgment below.

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In The

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October Term, 1992

TXO PRODUCTION CORP.,

Petitioner,

vs.

ALLIANCE RESOURCES CORP., THE TUG FORK LAND COMPANY, GEORGE KING and GROVER C. GOODE,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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No. 92-479

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TXO PRODUCTION CORP.,

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On Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS IN SUPPORT OF RESPONDENTS

I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate antitrust, commercial, consumer, environmental and securities fraud cases in federal and state courts. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity in cases that have the potential for advancing the

state of the law, educating the public, modifying corporate behavior, deterring wrongdoers and improving the access of victims to justice and adequate compensation for the wrongs that have been inflicted upon them. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors, consumers and small businesses from fraudulent, deceptive and manipulative practices. NASCAT's members frequently represent plaintiffs in a variety of individual, class action and derivative cases prosecuted under the federal antitrust, securities and environmental laws, equivalent statutes of the fifty States and state common law governing fraud and deceit, breach of fiduciary duty and similar torts. NASCAT and its members have an interest in the effective private enforcement of such statutes and in the development of case law that effectively deters wrongdoers.

Punitive damages are an important weapon in the efforts of NASCAT members to enforce laws protecting investors, consumers, small businesses, the environment and the integrity of the securities markets. Accordingly, NASCAT files this *amicus curiae* brief with the written consent of the parties in support of Respondents and urges this Court to affirm the decision of the court below.[1]

In *TXO*, the West Virginia Supreme Court of Appeals affirmed a jury verdict for Respondents, finding that

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[1] The decision of the Supreme Court of Appeals of West Virginia is reported as *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E. 2d 870 (*"TXO"*), *cert. granted*, ___ U.S. ___, 113 S. Ct. 594 (1992).

Petitioner, TXO Production Corporation ("TXO"), a subsidiary of USX, had knowingly and intentionally brought a frivolous declaratory judgment action against Respondents to clear a purported cloud on title. TXO's real intent, as the court below found, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease. Respondents counterclaimed alleging that TXO's actions were a slander of title. The McDowell County, West Virginia, jury which heard the evidence at trial returned a verdict in favor of Respondents, awarding them $19,000 in compensatory damages and $10 million in punitive damages. 419 S.E. 2d at 875. In its exhaustive opinion, the West Virginia Supreme Court of Appeals held that the jury had properly weighed conflicting evidence and found the "requisite malice" for an award of punitive damages against TXO, *id.* at 878. The court further concluded that the evidence showed that it had committed "unsavory and malicious practices," *id.* at 880. Significantly, the court below stated that "the record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by poorly supervised, low level employees – but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power vis a vis TXO's superior legal firepower." *Id.* at 881.

The court below also held that the trial court had properly admitted, under W. Va. R. Evid. 404(b), uncontradicted testimony by four lawyers to negate TXO's trial defenses of "good faith or the lack of malice." *Id.* Respondents offered the undisputed evidence of similar wrongful conduct engaged in by Petitioner in Louisiana, Texas and Oklahoma, *id.* at 881-83, "to disprove TXO's good faith defense and to show that this case was but part of a

pattern and practice of deception and chiseling by TXO." *Id.* at 883.

This much of the record in this case and the decision of the court below is beyond dispute. TXO has been found guilty of intentional, malicious acts directed toward Respondents, as well as a pattern and practice of fraudulent and deceptive conduct targeting other persons similarly situated. Taking all of the evidence (both disputed and otherwise) into account, the jury returned a verdict for Respondents on their counterclaim for slander of title and awarded compensatory and punitive damages. Thus, the only issues before this Court concern whether the trial court's jury instructions, the jury's award of $10 million in punitive damages, the trial court's post-verdict review of that award, and appellate review of the verdict satisfy the standards of procedural and substantive due process applied by this Court in *Haslip v. Pacific Mutual Life Ins. Co.*, 499 U.S. ___, 111 S. Ct. 1032 (1991) ("*Haslip*").

NASCAT supports Respondents' position and believes that the decision of the court below should be upheld for several reasons. First, this Court must recognize that the States are responsibly modifying their statutes and common law to accommodate reasonable public policy concerns about punitive damage awards; indeed, as this Court recently acknowledged, "[p]unitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).[2]

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[2] *See also Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages, and the factors the jury may consider in determining their amount, are questions of state law.").

Even *amici* supporting Petitioner concede that the States "are free to establish different standards for use by juries in fixing the amount of punitive damages." Brief of Arthur Andersen & Co., *et al.*, at 11. Over the past ten years the State legislatures – the elected representatives of the people – have overhauled the punitive damage laws of nearly every State and have enacted numerous different safeguards including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials, or (4) some combination of several of these measures. As demonstrated herein, *see* Part II.A. and Appendices A-F, *infra*, these changes in State law accommodate public policy concerns raised by Petitioner and its *amici* and are responsive to this Court's mandate in *Haslip*. The present system satisfies due process because it does not leave the jury without meaningful restraints and, to the extent further modification is needed, this Court should leave reform of punitive damages law to the political process, as Justices Scalia and O'Connor acknowledged in *Haslip*.[3]

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[3] Justice Scalia stated in his concurring opinion in *Haslip*, decided just two years ago:

> State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, *e.g.*, Alaska Stat. Ann. § 09.17.020 (Supp. 1990) (punitive damages must be supported by "clear and convincing evidence"); Fla. Stat. § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages

When this Court addresses state law its primary concern is the constitutionality, not the wisdom, of the law. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("We would not, of course, invalidate state law simply because we doubt its wisdom. . . . "). While the distinction may be difficult to draw in practice with the due process clause, in particular, because "reasonableness" and "fairness" are elements of both wisdom and due process, this Court "should hesitate to overturn long-established law on due process grounds without overwhelming evidence that the law is indeed unreasonable and unfair" and "such overwhelming evidence is not to be found" because, "[o]n the contrary, the present system satisfies due process." Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859, 915 (1991).[4]

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are limited to three times the amount of compensatory damages); Va. Code § 8.01-38.1 (Supp. 1990) (punitive damages limited to $350,000). It is through those means – State by State, and, at the federal level, by Congress – that the legal procedures affecting our citizens are improved.

111 S. Ct. at 1054 (Scalia, J., concurring); *see also id.* at 1067 (O'Connor, J., dissenting) ("As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.").

[4] In his insightful article analyzing this Court's decision in *Haslip*, Professor Riggs of Brigham Young University offered the following (unsolicited) guidance to this Court:

> The law of punitive damages may (or may not) stand in need of substantial reform. If reform is needed, constitutionalizing the law is a clumsy, inappropriate way to achieve it. The due process clause undoubtedly could be used as an instrument of reform because its contours are so vague and its substance so amorphous. For that very reason, however, the Court should hesitate to read new meaning into it unless fundamental rights can be protected in no other way. Otherwise due process becomes a cover for judicial legislation, a function now wholly eschewed by the Court in the past but one not conferred by the Constitution. A punitive damages claim involves no right more fundamental than money, and it is peculiarly amenable to legislative reform. Many legislatures have already given consideration to the matter. Without a clear mandate from the Constitution, the Court should leave reform of punitive damages law to the political process.

Id. at 917.

In addition, the federal circuit and district courts and state trial and appellate courts have considered dozens of challenges to punitive damage awards since *Haslip* was decided by this Court. As detailed herein, *see* Part II.B., *infra*, those courts are fairly applying the substantive and procedural due process standards established by this Court in *Haslip*, 111 S. Ct. at 1041-46, as demonstrated by the careful trial and appellate court review of the $10 million punitive damages award at issue here. *See TXO*, 419 S.E. 2d at 886-90. Post-*Haslip* cases from other jurisdictions demonstrate that the federal and state trial and appellate courts are following this Court's mandate to ensure that (1) juries are permitted to consider only admissible evidence when determining whether defendants are guilty of fraud, malice, or oppression, the predicates to any punitive damages award;[5] (2) juries are

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[5] Most courts have adopted the criteria set forth in the *Restatement (Second) of Torts* § 908(2) (1979):

properly instructed as to what factors must be considered before punitive damages may be awarded; (3) trial courts are conducting careful post-verdict reviews of punitive damage awards and setting aside (or reducing by remittitur) those awards which are excessive and/or unsupported by the evidence; and (4) appellate courts are meticulously reviewing such awards to ensure that substantive and procedural due process has been provided.

Finally, NASCAT believes that the availability of punitive damages is an essential weapon in the continuing struggle which consumers, investors and small businesses must wage against fraudulent schemes[6] and

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> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See, e.g., Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 740 (3d Cir. 1991) (applying Pennsylvania law), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3034 (1992). For a state-by-state summary of types of wrongful conduct giving rise to liability for punitive damages, *see* R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* 18-26 (1988). For examples of state pattern jury instructions specifying when punitive damages may be awarded, *see* 1 L. Schlueter & K. Redden, *Punitive Damages* 204-39 (2d ed. 1989).

[6] The financial costs incurred by society as a result of fraudulent activity are enormous. In 1974, the U.S. Chamber of Commerce estimated that approximately $42 billion was lost to fraud per year. Chamber of Commerce of the U.S., *A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss* 6 (1974). A decade later, the Attorney General of the United States observed

white-collar crime[7] which constantly threaten to cheat them of their hard-earned savings and opportunities.[8]

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that white-collar crime, principally fraud, costs society nearly $200 billion annually. 1985 Att'y Gen. Ann. Rep. 42; *see also White Collar Crime: Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. Parts I-III (1985). That now dated annual loss figure is similar in dimensions to our nation's drug problem, which is most often described as an epidemic. *See Drug Enforcement: Hearings on H.R. 526 Before the Subcommittee on Crime of the House Committee on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) (remarks of Rep. Hughes) ($110 billion spent annually on drugs while lost productivity costs approximately $60 billion per year).

[7] The Chief Justice has stated that "[w]hite-crime is 'the most serious and all-pervasive crime problem in America today.'" *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)). The Chief Justice added, "[a]lthough this statement was made [by Rep. Conyers] in 1980, there is no reason to think the problem has diminished in the meantime." *Id.* Unfortunately, this pattern of lawlessness has been present throughout much of modern history and it shows no signs of abating, as demonstrated by the facts of this case. Writing in the early days of this century, Louis Brandeis prophetically stated, "[t]he goose that lays the golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by someone else's goose." L. Brandeis, *Other People's Money* 17-18 (1914).

[8] *See* The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 33-34 (1967) ("Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizeable in gross but are also significant and possibly devastating for individual victims.").

The continued availability of punitive damages, in the words of the West Virginia Supreme Court of Appeals, "give[s] individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." *TXO*, 419 S.E. 2d at 888. Private citizens, investors and small businesses should not be deprived of one of their most effective weapons to combat fraud and white collar crime; indisputably, the threat of punitive damages properly and effectively deters individual and corporate wrongdoers from engaging in fraudulent schemes,[9] especially when measured by the actual or potential fruits of their wrongdoing.[10] Any rule of law which makes punitive damages

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[9] Since colonial days, this Court, the lower federal courts and the courts of the fifty States have recognized that the purpose of punitive damages is to punish wrongdoers and deter similar wrongful conduct by other persons or entities. *See Wackenhut Applied Technologies v. Sygnetron*, 979 F.2d 980, 985 (4th Cir. 1992) (applying Virginia law) ("The purpose of punitive damages is to punish and deter.") (citation omitted); *Adams v. Murakami*, 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348, 1350 (1991) ("The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers.") (citation omitted); *Restatement (2d) of Torts*, § 908(2), comment (b) (1979) ("[T]he purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence.").

[10] It is well settled (and undisputed by various *amici* who support Petitioner) that "[t]he amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence." Brief *Amici Curiae* for the American Council of Life Insurance, *et al.*, at 15 (citing *Haslip*, 111 S. Ct. at 1045); *see also id.* at 15-16 ("The defendant's profits from his misconduct – or, in some cases, the expected profits where the defendant fails to profit as expected – are objectively-based and often ascertainable without substantial difficulty."); *see also* Brief of Arthur Andersen &

less available concomitantly lessens their necessary deterrent value.[11]

In contending that they are unfairly caught in the web of tort litigation and that the present system of awarding punitive damages threatens their existence, the "Big Six" accounting firms who appear as *amici* for Petitioner have apparently forgotten their undisputed contribution to this country's ongoing savings and loan crisis by failing to fulfill their "public watchdog" role. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). The General Accounting Office (GAO) and the Office of Thrift Supervision (OTS) have been sharply critical of the accounting profession for its utter failure to uncover widespread fraud in failing financial institutions,[12] and (former federal prosecutor) Judge Royce C.

Co., *et al.*, at 11 (observing that "courts adjudicating constitutional challenges to punitive [damages] awards can and should look to the various factors that have been identified by legislatures, courts, and commentators as reasonable considerations in fixing the proper amount of punitive damages . . including profitability to the defendant . . . [and] the potential and actual harm caused by the defendant's conduct. . . . ").

[11] Professor Dorsey Ellis, one of the leading academic commentators on the subject of punitive damages, identifies seven objectives for punitive damages that he gleans from judicial opinions and related commentary: (1) punishment of the defendant; (2) specific deterrence (to prevent the defendant from repeating the offense); (3) general deterrence (to prevent others from committing similar offenses); (4) preservation of the peace; (5) inducement for private law enforcement; (6) compensation to victims for otherwise uncompensable losses; and (7) payment of the plaintiff's attorney's fees. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3 (1982).

[12] Running through the ongoing savings and loan crisis is the general problem of fraudulent financial reporting. When

Lamberth wrote that "[a]ccounting firms may have been responsible for many of the abuses which have led to this country's savings and loan crisis. In fact, OTS advised the court that approximately one-third of the 690 financial institutions that have failed were audited by Ernst & Young or its predecessor." *Director of Office of Thrift Supervision v. Ernst & Young*, 786 F. Supp. 46, 52 (D.D.C. 1992); *see also* Berton, *Big Accounting Firms Face Ban in S&L Bailouts*, Wall St. J., Mar. 14, 1990, at A3, col. 1 (reporting

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such aberrant behavior occurs, widespread consequences result, sometimes causing a devastating ripple effect. *See* Nat'l Comm'n on Fraudulent Fin. Reporting, *Report of the National Commission on Fraudulent Financial Reporting* 4 (1987). The GAO has been sharply critical of the accounting profession – most notably, *amicus curiae* Ernst & Young – for its utter failure to uncover the widespread fraud in these failing financial institutions:

> We conclude that for 6 of the 11 S&Ls, CPAs did not adequately audit and/or report the S&Ls' financial or internal control problems in accordance with professional standards. The CPA's problems involved (1) inadequate audit work in evaluating loan collectibility and (2) inadequate reporting on S&Ls' accounting practices, regulatory compliance, and internal controls. The nature of the audit and reporting problems was significant enough to warrant our referring the CPA firms performing the audits to regulatory and professional bodies for their review.
>
> The latest audit reports for the 11 S&Ls before they failed showed combined positive net worth totaling approximately $44 million. At the time of the S&Ls' failures, which ranged from 5 to 17 months after the date of the last audit reports, the 11 S&Ls had combined negative net worth totaling approximately $1.5 billion.

GAO, *CPA Audit Quality: Failures of CPA Audits to Identify and Report Significant Savings and Loan Problems* 1 (1989).

that six of the biggest accounting firms – five of the Big Six (excluding Price Waterhouse) – were banned from doing new work for thrifts by the Resolution Trust Corporation because of past faulty audits).[13] Commenting on accountants' central role in either looking the other way, fending off federal and state regulators, or neglecting to scour errant thrift institutions' books too carefully, former SEC enforcement chief and now Judge Stanley Sporkin wrote: "Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?" *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990).

In their *amicus curiae* brief, the Big Six accounting firms complain that they are "[c]hronically targeted by plaintiffs as the 'deep pocket' in various types of commercial tort litigation," and that they are often unfairly sued, "even though any culpability on their part is almost always many orders of magnitude less than others involved in a particular transaction," Brief of Arthur Andersen & Co., *et al.*, at 2, 19. Conveniently, the Big Six

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[13] *See also* Note, *Are the Accountants Liable? Auditor Liability in the Savings and Loan Crisis*, 25 Ind. L. Rev. 475, 486 (1991) (observing that from the beginning of the thrift crisis, some institutions were given "clean" audits only to be declared insolvent shortly thereafter); Harris, *The S&L Looters Who May Get Away*, Wall St. J., Feb. 12, 1990, at A12, col. 3 (noting that "crimes in thrifts . . . often required the cooperation of groups of people, in what might be called a 'chain of greed,' " including accountants who "either looked the other way or neglected to scour the institutions' books too carefully"); Wayne, *Where Were the Accountants?*, N.Y. Times, Mar. 12, 1989, § 3, at 1, col. 2 (detailing accounting firms' intimate involvement with numerous fraudulent savings and loan institutions).

have forgotten the integral role which at least three of them (or their predecessor firms) – Arthur Andersen & Co., Arthur Young & Co. and Touche Ross & Co. – played in assisting[14] twice convicted (federal *and* state court) felon Charles H. Keating, Jr. to carry out one of the largest fraudulent schemes in our nation's history, one which cost the taxpayers $2 billion and defrauded over 23,000 elderly residents of Southern California of their life's savings. *See In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1441-47, 1464-66 (D. Ariz. 1992) (*"ACC/Lincoln"*) (denying motions for summary judgment and detailing accountants' principal roles in aiding and abetting Keating's massive fraud and criminal scheme); 140 F.R.D. 425, 435-41 (D. Ariz. 1992) (detailing bond purchasers' testimony concerning how

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[14] In that case, Arthur Andersen & Co. fraudulently backdated loan data and "stuffed" files with loan documentation. *See* Thomas, *Regulators Cite Delays and Phone Bugs in Examination, Seizure of Lincoln S&L*, Wall St. J., Oct. 27, 1989, at A4, col. 2. The accounting firm paid $30 million to settle investors' claims. Arthur Young & Co. – the predecessor firm to Ernst & Young – gave ACC and Lincoln Savings unqualified auditing opinions even though federal examiners claimed Lincoln was insolvent. The accounting firm did not mention in its opinions the potential problems with Lincoln. Based on the firm's report that ACC's and Lincoln's financial condition were accurately represented, ACC sold $200 million of junk bonds to over 23,000 elderly investors. Following these sales, Arthur Young's senior partner who handled ACC/Lincoln's account resigned from the accounting firm and accepted a $930,000 position with ACC, four times greater than his annual compensation at Arthur Young. *See* Nash, *Auditors of Lincoln on the Spot*, N.Y. Times, Nov. 14, 1989, at D1, col. 3. Arthur Young paid $64 million to settle investors' claims.

they were defrauded by Keating and his compliant professionals – lawyers, accountants, consultants and investment bankers – through the sale of worthless securities).[15] In short, the accounting profession's exposure to liability is not the result of any so-called "tort explosion" but, rather, the culmination of their increasing willingness to surrender their professional integrity and ethics in willing service of financial charlatans and criminals.

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[15] The accounting profession's pattern of willfully assisting financial fraud is not limited to the above-referenced recent cases (including *ACC/Lincoln*) involving *amici* Arthur Andersen & Co., Deloitte & Touche and Ernst & Young and/or their predecessor firms; for details concerning *amicus* KPMG Peat Marwick's intimate involvement and assistance in a seven-year scheme to portray a now-bankrupt retailer as a thriving commercial enterprise in order to permit its principals to sell its now-worthless stock to an unsuspecting public, *see In re Crazy Eddie Sec. Litig.*, 1993 U.S. Dist. LEXIS 789 (E.D.N.Y. Jan. 20, 1993). In another financial scandal involving the failure of Penn Square Bank, whose previous auditor had issued a qualified opinion, after lending Peat Marwick partners money to invest in an office complex the Bank hired Peat Marwick and got a clean opinion. Within four months, the Bank collapsed and Peat Marwick ended up settling numerous multi-million dollar suits for undisclosed sums. *See* P. Zweig, *Belly Up: The Collapse of the Penn Square Bank* 174, 259 (1985). For details concerning *amicus* Price Waterhouse's willing assistance in the enormous financial fraud which was an integral part of criminal operations carried out by the notorious Bank of Credit and Commerce International (BCCI) – the largest financial fraud in world history – which deprived almost one million people of their life's savings, *see* U.S. Senate Subcommittee on Terrorism, Narcotics and International Operations, *The BCCI Affair: A Report to the Senate Committee on Foreign Relations* 323-67 (1992).

II. ARGUMENT

A. Responding To Public Policy Concerns And This Court's Mandate In *Haslip*, As Part Of The Democratic Process The Majority Of The States Have Modified Their Laws Governing Punitive Damage Awards And This Court Should Not Interfere With That Continuing Political Process

Over the past ten years, whether in response to public policy concerns or other factors, the elected representatives of the people have taken responsible step to substantially modify their respective States' laws concerning punitive damage awards. Those modifications have taken various forms, including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials in which the trier of fact must determine defendant's liability for punitive damages before it assesses such damages; (4) authorizing only trial judges to assess punitive damages if a jury has determine that they are warranted; (5) requiring trial courts to exercise their power of remittitur to reduce excessive punitive damage awards; and/or (6) requiring successful plaintiffs to share punitive damage awards with the State. *See* Appendices A-F, *infra*.[16] These legislative reforms demonstrate that the arguments raised against the old

[16] According to the Research and Policy Committee of the Committee for Economic Development, *Who Should Be Liable? A Guide to Policy for Dealing With Risk*, 103-05 & n.69 (May 1989), at least 28 states had statutorily modified their punitive damages laws since 1985. That number has since increased to an overwhelming majority of the States.

system of punitive damages have been persuasive, at least in some quarters; however, "it does not make a case that change is constitutionally required and may indeed be better evidence that the issue of punitive damages is a policy matter appropriately left to legislatures and, perhaps, to courts exercising their common law powers." Riggs, 52 Ohio St. L. J. at 876.[17] The States' legislative response to the so-called punitive damages "crisis"[18] may be categorized as follows:

[17] These legislative reforms include every solution to the punitive damages "problem" ever suggested by any Justice of this Court, *see Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting), as well as those advocated by commentators sympathetic to Petitioner and its *amici*. *See* Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 735-38 (1982); Wheeler, *A Proposal For Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 947-60 (1982).

[18] A number of commentators have challenged the popular notion that "awards of punitive damages are skyrocketing." *Browning-Ferris Indus.*, 492 U.S. at 282 (O'Connor, J., dissenting). The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 28 (Papers of the Roscoe Pound Found. 1991); *see also* Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. Pa. L. Rev. 1147, 1256 (1992) (noting that while the mean (*i.e.*, average) size of jury verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately); Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 13 (1990) (observing that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse").

Bifurcation: Nine states – California, Connecticut, Georgia, Kansas, Minnesota Montana, Nevada New Jersey and Ohio – require by statute bifurcation of the liability and damages phases of trials in which punitive damages may be assessed,[19] while the Supreme Court of Tennessee recently imposed the same requirement.[20]

Burdens of Proof: The function of the standard of proof is to "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979).[21] The legislatures of eighteen States – Alabama,

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[19] *See* Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Ga. Code Ann. § 51-12-5.1(d) (1992 Cum. Supp.); Kan. Code Civ. Proc. § 60-3701(a)-(b) (West 1992 Supp.); Minn. Stat. Ann. § 549.20(4) (West 1993 Cum. Supp.); Mont. Code Ann. § 27-1-221(7) (1992); Nev. Rev. Stat. § 42.005(3) (1991); N.J. Stat. Ann. § 2A:58C-5(b), (d) (West 1987); Ohio Rev. Code Ann. § 2315.21(C)(2) (Baldwin 1991). These statutory provisions are summarized and/or quoted in Appendix A, *infra*.

[20] *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) ("In a trial where punitive damages are sought, the court, upon motion of defendant, shall bifurcate the trial. During the first phase, the factfinder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages . . . During this phase, evidence of a defendant's financial affairs, financial condition, or net worth is not admissible. If the factfinder finds a defendant liable for punitive damages, the amount of such damages shall then be determined in an immediate, separate proceeding.").

[21] In the words of this Court, the "clear and convincing evidence" standard has been used "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant" because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the

Alaska, California, Colorado, Georgia, Indiana, Kansas, Kentucky, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota and Utah – have enacted statutes imposing higher standards of proof,"[22] while the courts of five additional

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plaintiff's burden of proof." *Addington v. Texas*, 441 U.S. at 423 (holding due process requires clear and convincing standard of proof in civil commitment proceedings); *see also In re Winship*, 397 U.S. 358, 361-64 (1970) (due process requires higher standard of proof for criminal convictions because of important liberty interests and stigmatization at stake). According to one view, this rationale encompasses actions in which punitive damages may be awarded. *See Haslip*, 111 S. Ct. at 1062 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake."); *see also* Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 994-95 (1989); Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 298 (1983).

[22] *See, e.g.*, Ala. Code § 6-11-20(a) (1992 Cum. Supp.); Alaska Stat. Ann. § 09.17.020 (1992); Cal. Civ. Code § 3294(a) (West 1993 Cum. Supp.); Colo. Rev. Stat. § 13-25-127(2) (West 1989); Ga. Code Ann. § 51-12-5.1(b) (1992 Cum. Supp.); Ind. Stat. Ann. § 34-4-34-2 (Burns 1986); Kan. Civ. Proc. Code Ann. § 60-3701(c) (West 1992 Supp.); Ky. Rev. Stat. § 411.184(2) (1992); Minn. Rev. Stat. Ann. § 549.20(1)(a) (West 1993 Cum. Supp.); Mont. Code Ann. § 27-1-221(5) (1991); Nev. Rev. Stat. § 42.005(1) (1991); N.D. Cent. Code § 32-03.2-11 (1991 Cum. Supp.); Ohio Rev. Code Ann. § 2315.21(C)(3) (Baldwin 1991); Okla Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. § 30.925(1) (1988); S.C. Code Ann. § 15-33-135 (1992 Cum. Supp.); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Utah Code Ann. § 78-18-1(1)(a) (1992). These statutory provisions are summarized and/or quoted in Appendix B, *infra*. *But see* Idaho Code § 6-1604 (1990) (codifying "preponderance of the evidence standard" for punitive damage claims); *see also* Iowa Code Ann. § 668A.1(1)(a) (West 1987) (jury must decide "[w]hether, by a preponderance of clear, convinc-

States – Arizona,[23] Hawaii,[24] Maine,[25] Maryland[26] and

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ing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another").

[23] *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 681 (1986) ("As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for the commission of a tort, we believe it appropriate to impose a more stringent standard of proof.").

[24] *See Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 571 (1989) ("[P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is required. . . . A more stringent standard of proof will assure that punitive damages are properly awarded.").

[25] *See Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) ("The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based on tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.").

[26] In *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 633 (Md. 1992), the Supreme Court of Maryland conducted a survey of other states' statutes and judicial decisions before adopting the clear and convincing evidence standard:

> Use of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded. We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.

601 A.2d at 648 (emphasis in original).

Wisconsin[27] – have adopted the same rule, even though in *Haslip* this Court rejected the argument that due process requires a heightened standard of proof of punitive damages:

> We have considered the arguments raised by [some of the parties] as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring, as many do, a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," as in the criminal context. We are not persuaded, however, that the due process clause requires that much.

111 S. Ct. at 1046 n.11 (citations omitted). Thus, nearly half of the States have already imposed proof requirements beyond what this Court requires to satisfy due process.[28]

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[27] *See Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437, 443 (1980).

[28] *See also Campbell v. Bartlett*, 975 F.2d 1569, 1577 (10th Cir. 1992) (refusing to set aside punitive damages verdict because the trial court "correctly applied New Mexico law requiring proof of punitive damages by a preponderance of the evidence" and "the United States Supreme Court has not held that due process requires a heightened standard of proof of punitive damages") (citations omitted); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1099 (5th Cir. 1991) ("Texas law authorizes recovery of punitive damages upon proof that a preponderance of the evidence justifies the award. Celotex cannot establish that constitutional due process requires a higher standard of proof based only upon a policy preference expressed by the United States Supreme Court.") (citation omitted), *cert. denied*,

Evidentiary Limitations: Seven States – California, Colorado, Maryland, Montana, Nevada, Oregon and Utah – have enacted statutes precluding the introduction of evidence regarding a defendant's financial condition or net worth until the jury has determined that that defendant is liable for punitive damages.[29]

Jury Instructions: At least six states – Alabama, Colorado, Kentucky, Minnesota, Montana and New Jersey – have codified jury instructions governing awards of punitive damages.[30]

Allocation of Damages: Because punitive damages are not compensatory in nature and their primary purpose is to advance the public good through specific and general

deterrence, nine States – Colorado, Florida, Georgia, Illinois, Iowa, Kansas, New York, Oregon and Utah – allocate a portion of every punitive damages award to a state agency.[31]

Cap Statutes: Ten states – Alabama, Colorado, Connecticut, Florida, Georgia, Kansas, Nevada, Oklahoma, Texas and Virginia – have enacted so-called "caps" on punitive damages awards.[32]

Remittitur: All but four States – Iowa, Kentucky, Missouri and Oregon – permit trial court remittitur of excessive punitive damages and numerous States have codified the trial court's authority and/or responsibility

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___ U.S. ___, 112 S. Ct. 1778 (1992); *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1101 (E.D. La. 1991) (interpreting footnote 11 in *Haslip* decision as a holding that the "preponderance of the evidence standard" satisfies due process).

[29] *See, e.g.*, Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.); Colo. Rev. Stat. § 13-21-102(6) (West 1989); Md. Code Ann. § 10-913(a) (1989); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(4) (1991); Or. Rev. Stat. Ann. § 30.925(2) (1988); Utah Code Ann. § 78-18-1(2) (1992). These statutory provisions are summarized and/or quoted in Appendix C, *infra*. In addition, as noted above (*see* note 20, *supra*), in *Hodges v. S.C. Toof & Co.*, 833 S.W. 2d at 901, the Supreme Court of Tennessee expressly stated that during the first (liability) phase of the required bifurcated trial, "evidence of a defendant's financial affairs, financial condition, or net worth is not admissible."

[30] *See, e.g.*, Ala. Code § 6-11-20(b)(1)-(3) (1992 Cum. Supp.); Colo. Rev. Stat. § 13-21-102(1)(b) (West 1989); Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (1992); Minn. Stat. Ann. § 549.20(3) (West 1993 Cum. Supp.); Mont. Code Ann. § 27-1-221(2)-(4) (1991); N.J. Stat. Ann. § 2A:58C-5(a) (West 1987). These statutory provisions are summarized and/or quoted in Appendix D, *infra*.

[31] *See, e.g.*, Colo. Rev. Stat. § 13-21-102(4) (West 1989); Fla. Stat. Ann. § 768.73(2)(a)(b) (West 1993 Cum. Supp.); Ga. Code Ann. § 51-12-5.1(e)(2) (1992 Cum. Supp.); Ill. Rev. Stat. ch. 110, ¶2-1207 (Smith-Hurd 1992 Cum. Supp.); Iowa Code Ann. § 668A.1(2)(b) (West 1987); Kan. Civ. Proc. Code Ann. § 60-3402(e) (West 1992 Supp.); N.Y. Civ. Proc. L. & R. § 8701(1) (McKinney 1993 Cum. Supp.); Or. Rev. Stat. § 18.540(1) (1992 Cum. Supp.); Utah Code Ann. § 78-18-1(3) (1992). These statutory provisions are summarized and/or quoted in Appendix E, *infra*.

[32] *See, e.g.*, Ala. Code § 6-11-21(1)-(3) (1992 Cum. Supp.); Colo. Rev. Stat. § 13-21-102(1)(a) (West 1989); Conn. Gen. Stat. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73(1)(a)-(b) (West 1993 Cum. Supp.); Ga. Code Ann. § 51-12-5.1(g) (1992 Cum. Supp.); Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2), (f) (1992 West Supp.); Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1991); Okla Stat. Ann. tit. 23, § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1993 Cum. Supp.); Va. Code Ann. § 8.01-38.1 (1992). These statutory provisions are summarized and/or quoted in Appendix F, *infra*. *See generally* Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L. J. 303 (1991).

to carefully review punitive damages awards to determine whether remittitur is necessary.[33]

These legislative enactments demonstrate that the States are responsive to arguments concerning the incidence and amount of punitive damages awards and have taken appropriate steps, as representatives of the people, to insure that defendants receive every applicable measure of procedural due process. Given this impressive record of achievement, this Court should not dictate to the States the precise manner in which they must address the issues presented in such cases.

B. The Federal And State Trial And Appellate Courts Have Taken Seriously This Court's Mandate In *Haslip* And, During The Past Two Years, Have Carefully Reviewed And Even Reduced Numerous Punitive Damages Awards

Two years ago, in *Haslip* this Court ruled that unlimited jury or judicial discretion in the fixing of punitive damages may invite extreme results that are unacceptable under the Due Process Clause. Although a mathematical "bright line" cannot be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, this Court noted that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter

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[33] *See, e.g.*, Ala. Code § 6-11-25 (1992 Cum. Supp.); Ark. Code Ann. § 16-64-124 (1987); Colo. Rev. Stat. § 13-21-102(1); Fla. Stat. Ann. § 768.74 (West 1993 Cum. Supp.); Ill. Rev. Stat. Ann. ch. 110, ¶2-1207 (Smith-Hurd 1992 Cum. Supp.); Mont. Code Ann. § 27-1-221(7)(c) (1991). *See generally* 2 J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice*, § 18.02 n.6 (Supp. 1989).

into the constitutional calculus." 111 S. Ct. at 1043. Having reviewed the procedures followed by the Alabama trial and appellate court in *Haslip*, this Court concluded that due process had not been violated because the award did not lack objective criteria and was subject to the full panoply of procedural protection. *Id.* at 1044-46.[34]

Judged by these standards, the decision of the Supreme Court of Appeals of West Virginia in this case clearly passes constitutional muster. *TXO*, 419 S.E. 2d at 886-90. It provides but one example of the federal and state trial and appellate courts' careful adherence to the principles laid down by this Court in *Haslip*. Reference to other post-*Haslip* decisions demonstrates with equal vigor that the federal and state courts are providing meaningful post-verdict and appellate review, whether under

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[34] As this Court noted in *Haslip*, first, the trial court's instructions placed reasonable constraints on the exercise of the jury's discretion by expressly describing punitive damages' purpose of retribution and deterrence, by requiring the jury to consider the character and degree of the particular wrong and by explaining that the imposition of punitive damages was not compulsory. 111 S. Ct. at 1044. Second, the trial court conducted a post-verdict hearing which provided a meaningful review of the amount of punitive damages fixed by the jury. *Id.* Third, the Supreme Court of Alabama also provided a meaningful review of the jury verdict and the trial court's discretion, which "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Id.* at 1045. In the recent words of the Fifth Circuit, *Haslip* "stand[s] for the general proposition that a punitive damage award by a properly instructed jury, where there is adequate post-verdict review, will not violate due process." *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1020 (5th Cir. 1992) (citing *Haslip*, 111 S. Ct. at 1044-45).

applicable State law or Fed. R. Civ. P. 59,[35] of punitive damages awards in tort cases of every stripe,[36] including actions for fraud,[37] tortious interference with con-

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[35] In the words of this Court, "[i]n reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse of discretion standard." *Browning-Ferris Indus.*, 492 U.S. at 279.

[36] The Fourth Circuit has stated that "[i]t would appear that the *Haslip* decision has, at least, compelled most state courts which have subsequently faced the due process issue to reconsider the constitutionality of their schemes for punitive damages." *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417 (4th Cir. 1992) (applying Virginia law). In that case, the Fourth Circuit reversed a $175,000 punitive damages award because the jury had not been properly instructed. *See also Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 350, 354 (1991) (establishing eight factor post-trial review of punitive damages awards in wake of *Haslip*); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc.*, 88 Md. App. 672, 596 A.2d 687, 711-12 (Spec. App.) (establishing "proper guidance" for jury's consideration of punitive damages claims in wake of *Haslip*), *cert. denied*, 323 Md. 1, 590 A.2d 158 (1991); *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897, 908 (1991) (establishing "a new system for the review of punitive damages" as a result of *Haslip*).

[37] *See Robertson Oil Co. v. Philips Petroleum Co.*, 979 F.2d 1301, 1303-07 (8th Cir. 1992) (applying Arkansas law) (affirming two punitive damages awards – one for $4 million for fraud and one for $4 million for tortious interference with business relationship – in distributor's lawsuit against oil company because state law "shock the conscience" standard and ten-part inquiry satisfied *Haslip* standards), *rehearing, en banc, granted*, 1993 U.S. App. LEXIS 1284 (8th Cir. Jan. 27, 1993); *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1500-01 (8th Cir. 1992) ($1 million punitive damages award in favor of

tracts[38] or business relationships,[39] invasion of

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each of ten of seed stock company's distributors for company's breach of contract and fraud did not violate due process requirements where trial court carefully instructed jury on applicable law of four states – Indiana, Iowa, Michigan and Ohio – concerning nature and purpose of punitive damages and trial court also thoroughly reviewed damage awards under relevant state law standards); *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 814-15 (8th Cir. 1992) (applying Illinois law) (affirming $1 million punitive damages award in fraud action brought by corporate customer against commodity futures merchant); *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1175-76 (11th Cir. 1991) (applying Alabama law) (affirming $9.1 million punitive damages award to 268 chicken growers in class action fraud claims against corporate buyer of broilers); *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1532-39 (W.D. Mo. 1992) (setting aside jury's $2.7 million punitive damages award for defendant distributor's fraud counterclaim against manufacturer).

[38] *See Benny M. Estes & Assoc. v. Time Ins. Co.*, 980 F.2d 1228, 1234-36 (8th Cir. 1992) (affirming punitive damages award of $1.7 million based upon insurance company's tortious interference with contracts between Arkansas agents and sub-agents); *Lightning Lube v. Witco Corp.*, 802 F. Supp. 1180, 1199-1201 (D.N.J. 1992) (setting aside jury's $50 million punitive damages award for franchisees in fraud and tortious interference with contracts action against franchisor); *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046, 1063-71 (1992) (reversing $2 million punitive damages award in action for tortious interference with contract brought by discharged attorneys against former client's opponent).

[39] *See Hilgedick v. Koehring Finance Corp.*, 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76, 84-91 (1992) (affirming $11 million punitive damages award to debtors in action against creditors arising out of interference with business relationships), *review granted*, 1992 Cal. LEXIS 3751, 10 Cal. Rptr. 2d 183, 832 P.2d 899 (1992); *MGW, Inc. v. Fredericks Devel. Corp.*, 5 Cal. App. 4th 92, 6 Cal. Rptr. 2d 888, 892-900 (1992) (affirming $2 million punitive damages award to real estate broker in action against developer

privacy,[40] false endorsement,[41] securities fraud,[42]

alleging interference with business relationships), *review granted*, 1992 Cal. LEXIS 3500, 10 Cal. Rptr. 2d 85, 832 P.2d 586 (1992).

[40] *See Peoples Bank & Trust Co. v. Globe Int'l Pub. Co.*, 978 F.2d 1065, 1071 (8th Cir. 1992) ($850,000 punitive damages award upheld in invasion of privacy case under Arkansas law where jury found by clear and convincing evidence that defendant acted with malice and jury instructions incorporated *Haslip* criteria); *Doe By Doe v. B.P.S. Guard Svcs., Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (applying Missouri law) (remanding case for consideration of defendant's post-trial motion for remittitur in invasion of privacy case in light of *Haslip* criteria).

[41] *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104-06 (9th Cir. 1992) (affirming $2 million punitive damages award in false endorsement action because it was supported by clear and convincing evidence, as required under California law).

[42] *See Jordan v. Clayton Brokerage Co. of St. Louis*, 975 F.2d 539, 541-42 (8th Cir. 1992) ($400,000 punitive damages award affirmed in investor's churning case against securities brokerage where jury instructions given under Missouri law and post-verdict standard of review complied with *Haslip*) *cert. denied*, 1993 U.S. LEXIS 1211 (1993); *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, MDL Docket No. 834 (D. Ariz. Oct. 27, 1992) (reducing $3.3 billion jury verdict to $1.75 billion and reducing punitive damages component from $2.9 billion to $750 million in class action alleging RICO, securities fraud and fraud and deceit).

personal injury[43] and wrongful death,[44] products liability,[45] defamation,[46] conversion[47] and bad faith actions

[43] *See Campbell v. Bartlett*, 975 F.2d at 1575-77 (applying New Mexico law) (affirming $200,000 punitive damages award in drunk driving case); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 98-110 (4th Cir. 1991) (applying South Carolina law) (reversing $100,000 punitive damages award in auto accident case when state law denied defendant due process because lack of meaningful standards allowed jury to exercise unconstrained discretion in making its award); *Wollersheim v. Church of Scientology*, 4 Cal. App. 4th 1074, 6 Cal. Rptr. 2d 532, 536-47 (1992) (finding $24 million punitive damages award for intentional infliction of emotional injury in former adherent's action against religious organization excessive and reversing judgment unless plaintiff accepted remittitur to $2 million).

[44] *See General Motors Corp. v. Johnston*, 592 So. 2d 1054, 1060-64 (Ala. 1992) ($15 million punitive damages award in wrongful death action held excessive and remittitur to $7.5 million ordered).

[45] *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1559-61 (10th Cir. 1991) (applying Kansas law) (finding excessive a $25 million punitive damages award in benzene poisoning case and ordering a remittitur of award to $12.5 million), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1941 (1992); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1238-43 (S.D. Iowa 1991) (reducing $50 million punitive damages verdict to $28 million in farm worker's product liability action against combine manufacturer).

[46] *See Brown v. Petrolite Corp.*, 965 F.2d 38, 49-50 (5th Cir. 1992) (applying Texas law) (affirming $700,000 punitive damages award in favor of oil services company arising out of competitor's publication of defamatory reports concerning plaintiff's products).

[47] *See Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1193-94 (10th Cir. 1992) (applying New Mexico law) (affirming $400,000 punitive damages award in stock certificate conversion case); *Cole v. Control Data Corp.*, 947 F.2d 313, 319-20 (8th Cir. 1991) (applying Missouri law) (remanding case so that district court could review $500,000 punitive damages award in

against insurers.[48] These cases unequivocally demonstrate the federal and state courts' careful scrutiny of all punitive damages awards in the wake of this Court's decision in *Haslip* and the substantial reduction of many excessive verdicts. Thus, the present system already weeds out insupportable punitive damages awards and there is no basis for this Court's imposition of additional standards in a field which should be left to the States.

III. CONCLUSION

For the reasons stated above, NASCAT respectfully submits that the decision of the court below should be affirmed.

March 1993

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conversion of computer software suit under *Haslip* standards applying state law principles).

[48] *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1380-86 (5th Cir. 1991) (applying Mississippi law) (affirming $500,000 punitive damages award, in addition to compensatory damages of $1,000, following bench trial in insured's action against insurer for wrongful denial of claim); *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886, 890-91 (Ala. 1992) (reaffirming $1 million punitive damages award in bad faith case after reconsideration in light of *Haslip*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 200 (1992); *Republic Ins. Co. v. Hires*, 810 P.2d 790, 792-93 (Nev. 1991) (reducing $22.5 million punitive damages award in insured's bad faith action against insurer to $5 million).

APPENDIX A

Statutes Requiring Bifurcation Of
Liability And Damages Determinations
In Punitive Damages Actions

California: The trial court "shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud." Evidence of profit and financial condition "shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud" and such evidence "shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud." Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.).

Connecticut: Conn. Gen. Stat. Ann. § 52-240(b) (West 1991) states that "[i]f the trier of fact determines that punitive damages should be awarded" in a products liability action, "the court shall determine the amount of such damages not to exceed the amount equal to twice the damages awarded to the plaintiff."

Georgia: Ga. Code Ann. § 51-12-5.1(d)(1)-(2) (1992 Cum. Supp.) provides that "[i]n any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made." If it is found that punitive damages are to be awarded, "the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what

amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances. It shall then be the duty of the trier of fact to set the amount to be awarded. . . . "

Kansas: Kan. Code Civ. Proc. § 60-3701(a)-(b) (West 1992 Supp.) ("In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded. . . . At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded. . . . ").

Minnesota: Minn. Stat. Ann. § 549.20(4) (West 1993 Cum. Supp.) ("In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.").

Montana: Mont. Code Ann. § 27-1-221(7) (1991) ("When the jury returns a verdict finding a defendant liable for punitive damages, the amount of damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review. . . . ").

Nevada: Nev. Rev. Stat. § 42.005(3) (1991) ("If punitive damages are claimed . . . the trier of fact shall make a

finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed.").

New Jersey: N.J. Stat. Ann. § 2A:58C-5(b), (d) (West 1987) ("The trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded. . . . If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. . . . ").

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(2) (Baldwin 1991) provides that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

APPENDIX B

Statutes Imposing Heightened Burdens
Of Proof In Punitive Damages Actions

Alabama: Ala. Code § 6-11-20(a) (1992 Cum. Supp.) (punitive damages may not be awarded "other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff"); *see also id.*, § 6-11-20(b)(4) (defining "clear and convincing evidence").

Alaska: Alaska Stat. Ann. § 09.17.020 (1992) ("Punitive damages may not be awarded in any action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence.").

California: Cal. Civ. Code § 3294(a) (West 1993 Cum. Supp.) provides that "[i]n an action for breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Colorado: Colo. Rev. Stat. § 13-25-127(2) (West 1989) requires proof *beyond a reasonable doubt* to support a punitive damages award.

Georgia: Ga. Code Ann. § 51-12-5.1(b) (1992 Cum. Supp.) (plaintiff must show by "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire

want of care which would raise the presumption of conscious indifference to consequences").

Indiana: Ind. Stat. Ann. § 34-4-34-2 (Burns 1986) ("Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.").

Kansas: Kan. Civ. Proc. Code Ann. § 60-3701(c) (West 1992 Supp.) ("plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the [bifurcated] trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice").

Kentucky: Ky. Rev. Stat. § 411.184(2) (1992) ("A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.").

Minnesota: Minn. Rev. Stat. Ann. § 549.20(1)(a) (West 1993 Cum. Supp.) ("Punitive damages shall be allowed in civil action only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.").

Montana: Mont. Code Ann. § 27-1-221(5) (1991) (specifying that "[a]ll elements of the claim for punitive damages must be proved by clear and convincing evidence" and defining "clear and convincing evidence").

Nevada: Nev. Rev. Stat. § 42.005(1) (1991) (it must be "proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied").

North Dakota: N.D. Cent. Code Ann. § 32-03.2-11 (1991 Cum. Supp.) (plaintiff must prove that "the defendant has been guilty by clear and convincing evidence of oppression, fraud, or malice, actual or presumed").

Ohio: Ohio Rev. Code Ann. § 2315.21(C)(3) (Baldwin 1991) ("In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages.").

Oklahoma: Okla. Stat. Ann. tit. 23, § 9 (West 1987) (punitive damages may be awarded only "if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed").

Oregon: Or. Rev. Stat. § 30.925(1) (1988) ("In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.").

South Carolina: S.C. Code Ann. § 15-33-135 (1992 Cum. Supp.) ("In any civil action where punitive damages are

claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.").

South Dakota: S.D. Codified Laws Ann. § 21-1-4.1 (1987) ("In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based on clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.").

Utah: Utah Code Ann. § 78-18-1(1)(a) (1992) ("[P]unitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.").

APPENDIX C

Statutes Imposing Limitations
On Admissible Evidence
In Punitive Damages Actions

California: Cal. Civ. Code § 3295(d) (West 1993 Cum. Supp.); *see* Appendix A, *supra*.

Colorado: Colo. Rev. Stat. § 13-21-102(6) (West 1989) ("In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.").

Maryland: Md. Code Ann. § 10-913(a) (1989) ("In any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.").

Montana: Mont. Code Ann. § 27-1-221(7) (1991) provides that "[e]vidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages." If the jury determines that a defendant is liable for punitive damages, "[i]n the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered." *Id.*

Nevada: Nev. Rev. Stat. § 42.005(4) (1991) ("Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the

subsequent proceeding to determine the amount of . . . punitive damages to be assessed.").

Oregon: Or. Rev. Stat. Ann. § 30.925(2) (1988) ("During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover. . . . ").

Utah: Utah Code Ann. § 78-18-1(2) (1992) ("Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.").

APPENDIX D

Statutes Codifying Jury Instructions
Governing Consideration Of
Punitive Damages Awards

Alabama: Ala. Code § 6-11-20(b)(1)-(3), (5) (1992 Cum. Supp.) (defining "fraud," "malice," "wantonness" and "oppression").

Colorado: Colo. Rev. Stat. § 13-21-102(1)(b) (West 1989) (defining "willful and wanton conduct").

Kentucky: Ky. Rev. Stat. Ann. § 411.184(1)(a)-(c) (1992) (defining "oppression," "fraud" and "malice").

Minnesota: Minn. Stat. Ann. § 549.20(3) (West 1993 Cum. Supp.) provides that any award of punitive damages "shall be measured by those factors which justly bear upon the purpose of punitive damages," including "the seriousness of hazard to the public arising from the defendant's misconduct," the "profitability of the misconduct to the defendant," the "duration of the misconduct and any concealment of it," the "degree of the defendant's awareness of the hazard and of its excessiveness," the "attitude and conduct of the defendant upon discovery of the misconduct," the "number and level of employees involved in causing or concealing the misconduct," the "financial condition of the defendant," and "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subjected." *See Kociemba v. G.D. Searle & Co.*, 707

F. Supp. 1517, 1535-38 (D. Minn. 1989) (jury hearing infertility claim awarded plaintiff $7 million in punitive damages, in addition to $750,000 for pain and disability and $1 million for emotional distress).

Montana: Mont. Code Ann. § 27-1-221(2)-(4) (1991) (defining "actual malice" and "actual fraud" as prerequisites for punitive damages award).

New Jersey: For product liability actions, N.J. Stat. Ann. § 2A:58C-5(a) (West 1987) identifies the relevant factors to be considered by the trier of fact, including the profitability of the misconduct, how long it lasted, when it was terminated, conducting indicating reckless disregard of the likelihood of serious harm, conduct aimed at mitigating the harm and the defendant's financial condition. These instructions were upheld against a constitutional challenge on due process grounds in *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1304 (D.N.J. 1990).

APPENDIX E

Statutes Allocating Punitive Damages
Between Plaintiffs And State Agencies

Colorado: Colo. Rev. Stat. § 13-21-102(4) (West 1989) specifies that "[o]ne-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund" with "[t]he remaining two-thirds of such damages collected shall be paid to the injured party." This statutory provision was declared unconstitutional in *Kirk v. Denver Pub. Co.*, 818 P.2d 262, 266-73 (Colo. 1991), because it was deemed an impermissible "taking" of a property right with no reasonable nexus between the taking and any government services made available to the particular judgment creditor who is forced to make contribution to the state.

Florida: Fla. Stat. Ann. § 768.73(2)(a)-(b) (West 1993 Cum. Supp.) allocates 35% of every punitive damages award to either the State's General Revenue Fund or its Public Medical Assistance Trust Fund. The constitutionality of this provision was upheld against a due process challenge in *Gordon v. State*, 585 So. 2d 1033, 1035-38 (Fla. App. 3d Dist. 1991), *aff'd*, 608 So.2d 800 (Fla. 1992), because the court recognized the Florida legislature's rational basis for allocating to the public a portion of damages that are intended to promote public interests.

Georgia: Ga. Code Ann. § 51-12-5.1(e)(2) (1992 Cum. Supp.) (75% of amounts awarded as punitive damages, "less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge," shall be paid into the State Treasury). This statutory provision was declared unconstitutional in

McBride v. General Motors Corp., 737 F. Supp. 1563, 1578-79 (M.D. Ga. 1990), because it applied only to product liability actions and on Eighth Amendment grounds because the state's 75% share constituted an "excessive fine."

Illinois: Ill. Rev. Stat. ch. 110, ¶2-1207 (Smith-Hurd 1992 Cum. Supp.) allows the trial court to apportion punitive damages among plaintiff, plaintiff's attorney and the Illinois Department of Rehabilitation Services.

Iowa: Iowa Code Ann. § 668A.1(2)(b) (West 1987) (75% of punitive damages award – after payment of costs and fees – allocated to a civil reparations trust fund). A constitutional challenge based on a "taking" argument was rejected by the Supreme Court of Iowa because a plaintiff has no vested property right to punitive damages prior to entry of judgment. *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc.*, 473 N.W. 2d 612, 619 (Iowa 1991).

Kansas: Kan. Civ. Proc. Code Ann. § 60-3402(e) (West 1992 Supp.) allocates one-half of punitive damages awards in medical malpractice cases to the State treasury.

New York: N.Y. Civ. Proc. L. & R. § 8701(1) (McKinney 1993 Cum. Supp.) (allocates 20% of every punitive damages award to the State).

Oregon: Or. Rev. Stat. § 18.540(1) (1992 Cum. Supp.) allocates one-half of every punitive damages award to the Criminal Injuries Compensation Account after deducting attorney's fees. In *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 797 P.2d 1019, 210-12 (1990), the Supreme Court of Oregon held that a trial court's instructions containing

a description of the statutory allocation scheme constituted reversible error.

Utah: Utah Code Ann. § 78-18-1(3) (1992) allocates one-half of any award in excess of $20,000 to the State Treasury.

APPENDIX F

Statutes Imposing Caps On Punitive Damages Awards

Alabama: Under Ala. Code § 6-11-21(1)-(3) (1992 Cum. Supp.), an award of punitive damages "shall not exceed" $250,000, unless it is based upon a "pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff," conduct involving "actual malice other than fraud or bad faith," or libel, slander, or defamation. *See Youngblood v. Lawyers Title Ins. Corp.*, 746 F. Supp. 71, 72 (S.D. Ala. 1989), *rev'd on other grounds*, 923 F.2d 161 (11th Cir. 1991).

Colorado: Colo. Rev. Stat. § 13-21-102(1)(a) (West 1989) provides that the amount of punitive damage awarded by the jury "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party." The trial court may increase any award of punitive damages "to a sum not to exceed three times the amount of actual damages" if it is shown that the defendant "has continued the behavior or repeated the action which is the subject of the claim . . . in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case" or that the defendant "has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff. . . . " *Id.*, § 13-21-102(3)(a)-(b).

Connecticut: Conn. Gen. Stat. § 52-240b (West 1991), which applies to product liability actions, specifies that "[i]f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such

damages not to exceed an amount equal to twice the damages awarded to the plaintiff."

Florida: Fla. Stat. Ann. § 768.73(1)(a)-(b) (West 1993 Cum. Supp.) provides that "the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded" unless "the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances" of the case.

Georgia: Ga. Code Ann. § 51-12-5.1(g) (1992 Cum. Supp.) (punitive damages awarded in tort actions "shall be limited to a maximum of $250,000").

Kansas: Under Kan. Civ. Proc. Code Ann. § 60-3701(e)(1)-(2) and (f) (1992 West Supp.), no award of punitive damages shall exceed the lesser of "[t]he annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded" or $5 million; however, if the court finds that "the profitability of the defendant's misconduct exceeds or is expected to exceed" that limitation, "the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1-1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct."

Nevada: Nev. Rev. Stat. Ann. § 42.005.1(a)-(b) (1991) provides that an award of punitive damages may not exceed "[t]hree times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory

damages is $100,000 or more" or "[t]hree hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000."

Oklahoma: Okla Stat. Ann. tit. 23, § 9 (West 1987) (jury may award punitive damages "in an amount not exceeding the amount of actual damages awarded"). At the conclusion of all the evidence, if the trial court makes a finding outside of the presence of the jury that there is clear and convincing evidence that defendant is guilty of oppression, fraud, or malice, this limitation on punitive damages does not apply. *See Massey v. Farmers Ins. Group*, 1993 U.S. App. LEXIS 2191, at *21 (10th Cir. Feb. 9, 1993).

Texas: Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (1993 Cum. Supp.) ("exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or $200,000, whichever is greater"). The statutory limitation, however, does *not* apply to punitive damages "resulting from malice . . . or to an intentional tort." *Id.*, § 41.008.

Virginia: Under Va. Code Ann. § 8.01-38.1 (1992), "the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact" and "[i]n no event shall the total amount awarded for punitive damages exceed $350,000." The statute specifies that the jury "shall not be advised of" this limitation; however, "if a jury returns a verdict for punitive damages in excess of the maximum amount specified . . . the judge shall reduce the award and enter judgment for such damages in the maximum amount

provided" by the statute. *See Wackenhut Applied Technologies v. Sygnetron*, 979 F.2d at 983-85 (affirming that Virginia statute applies to intentional torts).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND CO., GEORGE KING, AND GROVER C. GOODE,
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Appeals of West Virginia

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

October Term, 1992

No. 92-479

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND CO., GEORGE KING, AND GROVER C. GOODE,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals of West Virginia

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm as a result of tortious misconduct. This Court determination of whether the common-law method of assessing punitive damages violates due process will have a significant impact on the rights of plaintiffs.

Trial lawyers recognize that justice in America is administered, in large part, by the American people themselves. The jury is a distinctively democratic institution, reflecting the common sense and conscience of the community, beholden to no personal ambition, economic interest, or political constituency. The value of the independent jury is reflected in the array of special interests which have mounted an intense and heavily financed campaign to undermine its role under the guise of "tort reform." The heart of the challenge to punitive damages in this case is an attack on the jury.

ATLA therefore respectfully submits this brief as amicus curiae. The written consents of both parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

In this case, the Court is once again invited into the controversy surrounding punitive damage awards in civil lawsuits. The central issue is clear and relatively narrow: May the states continue to employ the common-law rule that the amount of punitive damages is to be determined by the jury, within the proper exercise of its discretion and based on the evidence in the particular case. Or must judges reexamine each jury verdict and reduce the award of punitive damages to meet a standard of proportionality based on a variety of mathematical and policy factors.

The focus of attack is the very cornerstone of our civil justice system: the jury. In a peculiar inversion of the familiar values this Court has associated with the Fourteenth Amendment, the most powerful interests in society seek relief from "oppression" -- not by government, but by the institution which the common law has devised as a check against the power of government.

This Court has recently held that the common-law method of assessing punitive damages comports with due process. Reliance upon the proper exercise of jury discretion to determine the appropriate measure of punitive damages has enjoyed longstanding acceptance at common law and by this Court. Moreover, jury discretion furthers important state interests embodied in substantive tort law.

The imposition of constitutional limits on the magnitude of punitive damage awards in state tort cases as a matter of substantive due process would require this Court to resurrect the doctrine of substantive due process scrutiny of economic regulation, an activist doctrine that the Court has firmly and wisely rejected. Nor has Petitioner established a compelling need to impose substantive limits on jury discretion. The common law itself provides ample protection against excessive punitive awards. Empirical studies demonstrate that the purported "explosion" of large punitive damage awards is little more than a myth.

Substantive limits on punitive damage awards in state cases run counter to the values of federalism. The proportionality standard authorizes judges, and ultimately this Court, to substitute their own views of the seriousness of violations of state substantive law for those of the states. Moreover, imposing such a limit effectively overrules the decisions of the great majority of state legislatures which have chosen not to enact substantive limits on punitive damages.

The strongest indication that jury discretion does not offend due process is the Seventh Amendment prohibition against courts reexamining jury findings except as provided by common law. Indeed a number of state courts have found legislative caps on damages violative of state constitutional guarantees of the right to trial by jury. It is sufficient in this case that this explicit constitutional guarantee is a clear indication that due process does not *require* courts to reduce jury verdicts on the basis of a proportionality standard.

Nor does the Due Process Clause require the adoption of a detailed scheme of procedural requirements in punitive damage cases. The rule in West Virginia and the majority of states that the jury may consider evidence of defendant's wealth is rationally related to the state's objectives in imposing punitive damages. With respect to other proposed procedures, the Due Process Clause does not require a particular code of procedures. This Court's opinion in *Haslip* did not depart from that position.

ARGUMENT

I. THE COMMON-LAW METHOD OF ASSESSING PUNITIVE DAMAGES BY RELYING ON THE DISCRETION OF THE JURY COMPORTS WITH DUE PROCESS.

The central question before this Court is whether American juries, after 200 years of accepted practice, shall be stripped of their responsibility for assessing the appropriate measure of punitive damages in civil cases. Instead, shall judges and appellate courts reexamine each award to determine whether it exceeds the constitutional maximum, as defined by this Court? Petitioner TXO contends that the common-law method of entrusting this determination to the broad discretion of juries violates the Due Process Clause. On that basis, Petitioner and numerous supporting amici urge this Court to impose substantive limits and more stringent procedural requirements on punitive awards.

Amicus submits that the Due Process Clause cannot support such a drastic intrusion by this Court into a field traditionally occupied by the states. The course Petitioner charts for this Court demands the rejection of fundamental principles that this Court has vigorously defended: the role of this Court in reviewing economic regulation, the role of the states in advancing important public policies through

substantive tort law, and the role of the jury in the civil justice system.

A. Reliance Upon Jury Discretion To Assess Punitive Damages, Historically Recognized At Common Law, Widely Practiced By American Courts, And Consistently Acknowledged By This Court, Comports With Due Process.

Petitioner, with the support of numerous amici, invites this Court to author a new volume of constitutional law: The federal constitutional law of punitive damages. TXO urges this Court to begin this work by declaring that the common-law method of assessing punitive damages, which relies upon the jury to determine the amount within the proper exercise of its discretion, violates due process of law. Jury "discretion," in this context, authorizes the jurors to determine the amount appropriate to punish and deter the specific misconduct, based on all the circumstances of the case and on the law provided in the judge's instruction.

TXO proposes that judges, and ultimately this Court, be the ultimate factfinders with respect to the amount of punitive damages awards. Judges, and ultimately this Court, would reexamine each jury verdict and adjust the amount of punitive damages based on a proportionality standard informed by mathematical comparisons to other awards and upon the judge's own evaluation of the harm to be punished and deterred. This standard, TXO expects, will deliver defendants from painfully high punitive damages awards.

The constitutional issue raised by TXO's proposal is indistinguishable from that addressed by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Prior to that decision, the Court had "never addressed" the issue of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." *Id.* at 1039. The Court squarely rejected the notion of a "mathematical bright line," of constitutionality, *Id.*

at 1043, and held that the common-law method of assessing punitive damages does not deny due process *Id.*

Nevertheless, TXO and supporting amici seize upon the *Haslip* Court's remark that the ratio of punitive to compensatory damages in that case "may be close to the line," *Id.* at 1046, as holding out the promise that there is some limit beyond which juries may not award punitive damages [1] Brief of Petitioner at 12 In addition, they advise the Court that the premise of *Haslip* -- that procedural safeguards are sufficient to ensure fundamental fairness, is "doubtful." *Id.* at 11 *See also,* Brief for the American Tort Reform Association at 4 (the constraints recognized in *Haslip* "have of not abated the flow of 'staggering' judgments.")

Petitioner therefore submits a substantive upper limit to awards in the form of a proportionality test The wisdom and practicality of this standard are both questionable and irrelevant The sole constitutional issue before this Court is whether punitive damage awards in the absence of such a substantive limit violate the Due Process Clause TXO's proposal to this Court is constitutionally indistinguishable from Pacific Mutual's and should similarly be rejected

The Due Process Clause does not enumerate the basic elements of fundamental fairness Nor, however, is a policy mandated by the Constitution merely because it is "enlightened and wise." *Lassiter v. Department of Social Services,* 452 U.S. 18, 34 (1981). Were that the case, fundamental fairness would be reduced to no more than the personal "predilections" of judges, or Justices. *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977). Instead, "history and widely shared practice [are] concrete indicators

[1]Out of context, the Court's remark is somewhat puzzling. However, a fair reading of the remark in the context of the preceeding discussion might be that the magnitude of the award warranted inquiry into whether the defendant was actually afforded the protections provided by state law to confine jury discretion to proper purposes.

of what fundamental fairness and rationality require." *Shad v. Arizona,* 111 S. Ct. 2491, 2501 (1991) [2]

The Due Process Clause receives its meaning the specific guarantees set forth in the Bill of Rights and from "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke." *Moore, supra,* at 502, quoting *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting) Specifically, this Court has long held that, in large measure, the common law defines due process In ascertaining what process is due,

> We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1856)

More recently, Justice Powell reemphasized this view that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit

[2]TXO's reliance upon *Shad,* Brief of Petitioner at 15, is misplaced Due process is informed by the historical and contemporary practices and procedures afforded by the justice system, not by the range of verdicts or awards

The *Shad* Court rejected defendant's contention that jury instructions which did not require the jurors to agree on either premeditation or felony-murder as the basis for their first-degree murder verdict denied him due process Even in this capital murder case, the plurality emphasized the limited role of the Due Process Clause in rewriting state law. "We do not, of course, suggest that jury instructions requiring greater specificity are not desirable. . . We hold only that the Constitution did not command such a practice in this case." 111 S. Ct. at 2501.

of happiness by free men'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). Under this view "the fourteenth amendment encompasses the same liberties as those protected by the common law." *Id.* at 679 n.47.

The practice of awarding punitive damages was, of course, well recognized at common law prior to the drafting of the Constitution. *Browning-Ferris Indus. v. Kelco Disposal Inc.*, 109 S. Ct. 2909, 2919 (1989). Of particular significance is the historical acceptance of the principle of jury discretion as an integral part of the very definition of punitive damages. *Id.* at 2920 n.20, quoting Lord Camden's upholding "exemplary damages" based on the jury's discretion in determining the amount of damages in tort actions in *Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763). *See* L. Schlueter & K. Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

Prior to the Fourteenth Amendment, this Court recognized that punitive damages were "a well established principle of the common law" in which the determination of the amount "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). The Court later noted that the common-law remedy of punitive damages was widely accepted by the states, and that "nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

This Court has in the past reviewed the magnitude of statutory penalties under the Due Process Clause. *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885)(double-damage penalty upheld); *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26 (1889)(same); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913); *Waters-Pierce Oil Co. v.*

Texas, 212 U.S. 86, 111 (1909)(upholding $1.6 million penalty and cancellation of license to do business); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913)($500 fine for violating rate ceiling excessive); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915)($100 per day fine excessive); *St. Louis, Iron Mountain & Southern Ry. v. Williams*, 251 U.S. 63, 67 (1919)(upholding $75 penalty for fare overcharge of 66 cents). However, this Court has never imposed substantive due process limits on jury awards. *Haslip* at 1039.

Even in those instances where the Court deemed large punitive awards harmful to substantial countervailing public policies, the Court protected those policies by addressing liability rules rather than imposing proportionality limits on the discretion of juries to fix the amount of damages. *See, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974); *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981).

Indeed the trust in the jury extends even to imposing the death penalty. As this Court stated in a capital punishment case,

> the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'

McKlesky v. Kemp, 481 U.S. 279, 331 (1987).

The notion that remedies and procedures developed and applied by the common-law courts may themselves be inimical "to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968), is anomalous.[3]

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[3]It is possible that, following a dramatic change in circumstances or social values, what once conformed to notions of fairness may be seen to offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). Such a case is not before this Court.

It is jury discretion, not judicial limits, which lays clear claim to historical pedigree

B. Jury discretion in assessing punitive damages furthers important state interests.

TXO complains that according broad discretion to juries in assessing punitive damages is fundamentally unfair because jurors are free to exercise bias and prejudice, Brief of Petitioner at 23, and because defendants receive no fair warning of the amount of damages that might be awarded prior to committing the misconduct Id at 47

The possibility of bias against corporate or out-of state defendants is present in jury verdicts generally, including those assessing compensatory damages finding liability The remedy is found in clear instructions to the jury, not limits on all awards Further, while there must be notice of what conduct is forbidden, a defendant is not entitled to advance notice of the amount of the penalty *Haslip* at 1046 n 12

More importantly, the relative unpredictability that comes with permitting jurors to tailor the measure of damages to the circumstances of the individual case serves important state interests *Tuttle v. Raymond*, 494 A 2d 1353, 1359 (Me 1985)("the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine")

The purpose of tort law is to protect the health, property, economic rights and civil rights of citizens not only by compensating those whose rights are invaded, but also by punishing and deterring misconduct This is the very basis of the "fault" principle in tort law Cooter, *Economic Analysis*

The evil which TXO complains of, the possibility of arbitrary verdicts, has been a characteristic of the rule of jury discretion since its inception Moreover, there is no indication that society's notions of justice have so changed that entrusting important matters to juries is viewed as intolerable

of Punitive Damages, 56 So Cal L Rev 79, 137 (1982)("there is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers"), Morris, *Punitive Damages in Tort Cases*, 46 Harv L Rev 1173, 1177 (1931)(punitive damages merely increase the severity of the "admonitory" function of compensatory damages)

Compensatory damages alone are not adequate to achieve this goal In some situations, such as willful violations of civil rights, the harm may not be reflected in the compensatory award *Carlson v. Green*, 446 U S 14, 22 n 9 (1980)(in such cases, "punitive damages may be the only significant remedy") In other circumstances, such as fraud and bad faith, a defendant may view the misconduct as profitable due to the low probability of getting caught *See, e.g., Bankers Life & Cas. Co. v. Crenshaw*, 483 So 2d 254, 271 (Miss 1985)

In still other situations, notably product liability, a wrongdoer may be able to pass along the anticipated liability to consumers

> Compensatory damages are often foreseeable as to amount . . . . Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition

Fischer v. Johns-Manville Corp., 103 N J 643, 664, 512 A.2d 466, 477 (1986), *see also Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo 1984)("If punitive damages are predictably certain, they become just another item in the cost of doing business") "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of

paying limited punitive damages." *Leonen v. Johns- Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989).

A well-known example is the Ford Pinto. An internal Ford memo anticipated that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the hazard could be eliminated for less than $11 per car. Ford management nevertheless determined that it was more profitable to pay damages than to fix the car. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981). *See also, Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986).

In other words, predictable damages may cease to deter and become, in effect, the purchase price for a license to do harm.

Nor do criminal penalties provide the necessary punishment and deterrence. As this Court has noted, criminal fines are "often calculated without regard to the harm the defendant has caused," and may lack "precise deterrent effect." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1987). Illustrative again is *Grimshaw*:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

Not only has this Court recognized that punitive damages "have long been a part of traditional state tort law," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)(upholding a

$10 million punitive damage award), the Court has viewed punitive damages, including the discretion accorded to juries, as an important remedy in furthering federal interests. The Court explained in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), that by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. 1983] directly advances the public's interest in preventing repeated constitutional deprivations." *See also Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980)("punitive damages may be the only significant remedy available in some §1983 actions where constitutional rights are violated but the victim cannot prove compensable injury.").

II. THIS COURT SHOULD NOT IMPOSE SUBSTANTIVE LIMITS ON JURY AWARDS OF PUNITIVE DAMAGES UNDER STATE LAW.

A. This Court Should Not Resurrect Substantive Due Process Review Of Economic Regulation

TXO opens its argument by advising this Court that the basic premise of its decision in *Haslip* -- that basic procedural safeguards are sufficient to assure fundamental fairness in punitive damage awards -- is "doubtful." Brief of Petitioner at 11. It is necessary, TXO argues, for this Court to establish "substantive constitutional limits" beyond which punitive damage verdicts may not go, regardless of the procedures used. *Id.* at 12.

At the outset, TXO fails to define the substantive limit it would have this Court impose. Mindful of this Court's instruction that there is no "mathematical bright line," TXO suggests four: (1) previous punitive damage awards in the same jurisdiction, (2) awards involving similar misconduct in other jurisdictions, (3) legislative penalties for similar

misconduct, and (4) the ratio to compensatory damages. *Id.* at 16. It is left to judges, and ultimately this Court, to "pick a number" in each case that indicates the point at which much becomes too much. Even then, "not all large punitive damage awards are constitutionally defective," and may be justified as reasonably necessary to punish and deter the misconduct. *Id.* at 32-33.

The substantive due process limit defined by petitioner is the point at which an award "exceeds the bounds of contemporary and historical practice by *orders of magnitude*, absent compelling and particularized justification." *Id.* at 21 (emphasis in original). Significantly, TXO does not indicate what the constitutionally permissible award would be in this case.

This Court cannot, of course, impose such a limit on state awards directly. "In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning-Ferris, Indus. v. Kelco*, 109 S. Ct. 2909, 2922 (1989). TXO is therefore correct in its assumption that a standard can be imposed, if at all, only by resort to substantive due process, which forbids certain deprivations by the state regardless of the fairness of the procedures used. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Few doctrines have been as firmly rejected by this Court, however, as the interference in economic regulation under the banner of substantive due process. Justice Holmes correctly admonished the Court that "the Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting). The Court's decision in *Lochner* to interpose its "economically correct" views under the guise of due process has been described as "one of the most ill-starred decisions that it ever rendered." W.

Rehnquist, The Supreme Court: How It Was, How It Is 205 (1987).

In the years following its unlamented end in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), the *Lochner* era has served as a reminder of the wisdom of "caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

This Court has been scrupulously cautious in rejecting invitations to resort to substantive due process, even in non-economic settings affecting personal liberties. *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *Deshaney v. Winnebago County Dept. of Social Services*, 109 S. Ct. 998, 1007 (1989). TXO offers no principled justification for resurrecting substantive due process scrutiny in economic matters solely for the benefit of litigants in private civil lawsuits.

B. Substantive Limits Are Not Essential to Fundamental Fairness.

1. Judicial Review Under Common Law Practice Provides Ample Protection Against Excessive Awards.

A feature of the common law of punitive damages is reliance upon judicial review to prevent excessive awards. *See*, Restatement (Second) of Torts §908, comment d (1979). Under the common-law standard, a verdict may be overturned where it was "so excessive . . . as to demonstrate that the jury have acted against the rule of law, or have suffered their passions, their prejudices, or their perverse disregard for justice to mislead them." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). The precise formulation and the factors weighed to ensure against excessive verdicts vary as matters of state law. *See generally* L. Schlueter & K. Redden, Punitive Damages §6.1B (2d ed. 1989). Nevertheless, "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The spectre of

bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979)

Indeed, defendants enjoy greater protection against large punitive awards than against large compensatory awards. For example, although many states permit a judge to order a new trial on the basis of inadequate compensatory damages, virtually all accept the view that additur does not apply to punitive damages. Courts may reduce, but not increase the jury's award. *Louisville & Nashville R.R. v. Street*, 164 Ala. 155, 51 So. 306 (1909), *Wangen v. Ford* Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980), *see* Note, 16 Cumberland L. Rev. 151, 158 (1985-86).

Another special protection is the well-settled rule that "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982). *See also, Vasbinder v. Scott*, 976 F.2d 118, 121-22 (2d Cir. 1992)(financial condition of the defendant is to be taken into consideration so that a punitive award does not "result in the financial ruin of the defendant . . . or constitute a disproportionately large proportion of defendant's net worth."); *Olson v. Walker*, 781 P.2d 1015, 1021 (Ariz. App. 1989)(award "must not financially kill the defendant"); *Thiry v. Johns-Manville Corp.*, 661 P.2d 515, 518 (Okla. 1985)(similar). Compensatory damages are not so limited.

The accusation that courts are unable or unwilling to protect against excessive awards has no basis. If anything, "the court exercises much closer supervision over [punitive] awards than is the case with compensatory awards." *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). *Accord, Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934 (1990); *Deal v. Byford*, 127 Ill. 2d 192, 537 N.E.2d 267, 272 (1989).

Commentators have noted a trend toward increased judicial scrutiny of punitive damage verdicts. *See* Ghiardi, *Punitive Damage Awards: An Expanded Judicial Role*, 72 Marquette L. Rev. 33, 43 (1988); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 44 (1982). And empirical studies indicate that courts frequently reduce or reverse punitive verdicts where appropriate. *See* M. Peterson, S. Sarma, M. Shanley, Punitive Damages: Empirical Findings viii (RAND Institute for Civil Justice 1987). A study of product liability verdicts found that courts reduce punitive damages to a greater extent than compensatory awards. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States 47 (Sept. 1989); M. Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 32 (1991)(in over half of all product liability punitive damage verdicts appealed, the punitive award was reversed or reduced).[4]

2. The Frequency and Amount of Punitive Damage Verdicts Do not Warrant Constitutional Action.

The sole justification offered by TXO for reversing this Court's holding that jury discretion in assessing punitive damages does not offend due process is that only "Modest and measured punitive awards were familiar to the Framers of the Constitution and the Fourteenth Amendment." Brief of Petitioner at 33, citing Brief of American Tort Reform Association as Amicus. The ATRA brief expands upon this

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[4]This fact does not necessarily indicate that the jury's initial award was wrong. In some states, evidence of the defendant's wealth is not placed before the jury. Evidence that the defendant has been held liable for similar conduct in other cases is generally excluded so as to protect defendant from unfair prejudice. Adjustments in the amount of punitive damages based on these factors are reserved for judicial review.

point, as do other amici, denouncing a purported "continuing upward spiral" of "staggering" awards. Focusing specifically on product liability cases, ATRA contends that this increase threatens useful products and research in such fields as pharmaceuticals. Brief of ATRA at 4-6.

Setting aside the dubious proposition that increasing jury awards necessarily indicates something is wrong with juries,[5] recent empirical studies show that this "explosion" is little more than a myth.

If unrestrained jury sympathy for plaintiffs and bias against corporate defendants were indeed causing an explosion in punitive damage verdicts, it would be most evident in personal injury, especially product liability verdicts. This is not the case. The Institute of Civil Justice at the Rand Corporation, which is funded primarily by business and insurance interests, examined some 17,000 civil jury trials in Cook County and San Francisco County during 1960-84. The researchers concluded that "Punitive damages were rarely awarded in personal injury cases and there is little evidence that frequency has increased significantly." The study also found that most punitive damage awards remained fairly modest." M. Peterson, S. Sarma, M. Shanley, Punitive Damages: Empirical Findings 65 (RAND Institute for Civil Justice 1987). The study found that punitive awards had increased in cases involving business and contract torts, which the researchers did not attribute to jury discretion, but to recent developments in insurance bad-faith law and an increasing tendency for businesses to sue each other. *Id.*[6]

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[5]No one would seriously argue, for example, that the increase in convictions for drug offenses warrant imposing limits on the ability of juries to return guilty verdicts.

[6]An American Bar Association study examined the Rand data and concluded that:

> contrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation. While punitive damages awards have grown in frequency and size over the past 25 years, the bulk of this growth has been in cases of intentional torts, unfair business practices or contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive.

Report of the Special Committee on Punitive Damages, Punitive Damages: A Constructive Examination 2-1 (ABA 1986).

In the specific area of products liability, an empirical study of reported decisions indicated that punitive damages are so infrequent as to be of "relative insignificance." W. Landes and R. Posner, The Economic Structure of Tort Law 304-06 (1988). The U.S. General Accounting Office found that "Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases," and were likely to be reduced by judicial review. GAO, Product Liability: Verdicts and Case Resolution in Five States 31 & 47 (Sept. 1989).

The most extensive analysis of punitive damage verdicts, covering 47 counties in 11 states, has been completed by Stephen Daniels and Joanne Martin for the American Bar Foundation. They found that:

> Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest. . . . Furthermore, plaintiffs were least likely to be awarded punitive damages in a case involving physical harm -- even if that case involved medical malpractice or products liability.
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> • • •
>
> The punitive damage rates for physical harm cases, including the high visibility areas of medical malpractice and products liability, were extremely low throughout the 19 years [1970-1988]. Furthermore, the typical punitive damage award remained modest.

S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 43 & 61-62 (1990).

A recent study conducted under the auspices of the Roscoe Pound Foundation of virtually all punitive damage verdicts in products liability cases from 1965 to 1990 found that juries had awarded punitive damages in only 355 cases M Rustad, Demystifying Punitive Damages in Products Liability Cases A Survey of a Quarter Century of Trial Verdicts 23 (1991) While virtually all the cases involved serious injury or death, *Id.* at 30, the median punitive award was $625,000 *Id.* at 29 Significantly, in over three-fourths of the cases studied, the manufacturer undertook some action to improve product safety *Id.* at 39

"There is surprisingly little evidence," states a highly significant study, "that liability currently hinders international competitiveness " P Reuter, The Economic Consequences of Expanded Corporate Liability 37 (RAND 1988) One reason is that total product liability costs (of which punitive damages are a small fraction) add a relatively small amount to the price of the product -- less than 1% for the vast majority of companies, according to a broad survey of the risk managers of American manufacturers Weber, *Product Liability: The Corporate Response* 13 (The Conference Board, 1987), Reuter at 45

It is also worth noting that foreign importers are subject to the same punitive damage laws For example, Honda, which makes one of the largest selling cars in the U.S., was held liable for compensatory and punitive damages in *Dorsey v. Honda Motor Co.*, 673 F 2d 911 (5th Cir 1982)($5 million punitive award based on evidence that the Honda knowingly marketed unsafe automobile) Potential liability for punitive damages, however, does not appear to be discouraging foreign manufacturers from competing in the U S market

Another argument raised by advocates of limits on punitive damages is that the threat of large awards is having a detrimental effect on research and development of useful products such as prescription drugs *See, Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S Ct 2909, 2924

(1989)(O'Connor, J., dissenting) (citing to Brief of Pharmaceutical Manufacturers Association as Amicus Curiae) The reality is that American companies are spending vast sums to develop new medicines *See,* "Companies Search For Next $1 Billion Drug," New York Times, Nov 28, 1988, at D1 PMA itself announced in a series of advertisements in the national media that research and development by U.S. pharmaceutical firms has "doubled every five years since 1970," and "Nearly half of the new medicines that achieved worldwide acceptance over a 12-year period originated in the United States." The series, "Innovations In Medicine," appeared in The Washington Post, Nov. 17, 1989

Recently PMA announced that the prescription drug industry is investing a record $12.6 billion in research and development of new drugs in 1993 PMA's advertisement appeared in Wall Street Journal, March 2, 1993, at B5 and in other major newspapers

C. Substantive Limits on Punitive Damage Awards Run Contrary to the Role of the States in our System of Federalism

1. Federal Limits On Punitive Damage Awards Interfere With State Enforcement Of Policy Goals.

This case, also, is about federalism *Coleman v. Thompson*, 111 S Ct 2546, 2552 (1991) Justice O'Connor's compelling defense of our system of federalism is particularly applicable in this case

> The federalist structure of joint sovereignty preserves to the people numerous advantages It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society, it increases opportunity for citizen involvement in democratic processes, it allows for more innovation and experimentation in government, and it makes government more responsive by putting the States in competition for a mobile citizenry

Gregory v. Ashcroft, 111 S Ct 2395, 2399 (1991)

Punitive damages do not constitute a separate cause of action; they are an important means of punishing and deterring misconduct which a state deems particularly unacceptable under its substantive tort law. Morris, *Punitive Damages in Tort Cases*, 46 Harv. L. Rev. 1173, 1177 (1931). The dissent in *Haslip* points out, "Imposed wisely and with restraint, they have the potential to advance legitimate state interests." 111 S. Ct. at 1056. The wisdom and appropriate restraint in their application, Amicus suggests, are the province of the states.

No one would dispute that, for example, Minnesota might view intentional pollution of its lakes as especially reprehensible, or that Arizona might take the same view of fraud against elderly consumers, or California, with respect to habitual drunk drivers. A federal substantive limit on the amount of damages recoverable for such misconduct necessarily undermines these state policy choices. The mathematical limits based on comparisons with compensatory damages, awards in other actions, and awards in other states certainly interfere with a state's ability to punish and deter misconduct through punitive damage awards. So too does the more general proportionality standard under which TXO would have this Court make its own determination of where slander to title falls "on the scale of relative seriousness." Brief of Petitioner at 17.

It is not the role of the Court to announce to the state that, as a matter of constitutional law, it takes the pristine nature of its lakes or the integrity of ownership of its mineral resources too seriously. That concern is properly left to the political process in the states. As this Court recently stated, "The people of Wisconsin may well prefer a [different] system of liability . . . But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *DeShaney v. Winnebago County Dept. of Social Services*, 109 S. Ct. 998, 1007 (1989).

2. Substantive Limits Interfere With State Legislative Solutions To Punitive Damages Issues

Does the common law rule place too much power in the hands of jurors? Not only should this question be addressed by state legislatures, rather than by this Court, but nearly every state legislature has done so. Indeed many of the amici who appear in support of TXO in this case, most notably the American Tort Reform Association, are major participants in the tort reform lobby which placed its proposals for limits on punitive damages before nearly every state legislature during 1986-1990. As result of this well-orchestrated and lavishly financed lobbying effort,[7] about 22 states have enacted some elements of the tort reformers' punitive damages agenda. However, only nine have imposed limits on the amounts of punitive awards. *See* American Tort Reform Association, Tort Reform Accomplishments, 1986-1989 18-20 (1989).[8]

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[7]The anxiety-laden rhetoric of the tort reformers' intensely politicized campaign has been compared to the recent marketing tactic known as "slice-of-death" advertising. "Consequently, the current debate over punitive damages has become not a matter of rational discourse, but one of public relations, propaganda, and the mobilization of prejudice and fear. Daniels and Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 13 (Oct. 1990).

The tort reform lobbying effort has been sharply criticized by scholars as an exercise in "raw interest group politics" employing "smokescreens and false alarms." Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988), and "intentional misrepresentation." Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law.*, 24 Houston L. Rev. 81, 96 (1987). These allegations are of particular concern since those whose rights are "reformed" are, by definition, unknown future victims of tortious misconduct, and therefore politically powerless. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 Harv. J. on Legis. 143, 189 (1981).

[8]For extensive citation to state statutes affecting punitive damages, See Brief of the Attorney General of West Virginai, as Amicus Curiae.

The tort reform lobby now asks this Court to impose upon the states limits which their legislatures have rejected In fact, ATRA urges this action upon the Court precisely *because* some state legislatures have failed to enact their proposals Brief of American Tort Reform Association at 29

TXO argues eloquently for the primacy of legislative policy judgments in this area Brief of Petitioner at 13 ATLA respectfully suggests that deference to legislative judgments extends not only to those states which have enacted tort reforms, but also to the larger number which have preserved the common law method of assessing punitive damages [9]

D. Substantive limits on punitive damages undermine the role of the jury.

1. Juries Are Competent To Fulfill Their Role As Factfinder With Respect To Punitive Damages.

Much of the argument of TXO and its amici is driven by a deep and cynical distrust of juries Substantive limits must be imposed, the argument runs, because procedural safeguards are inadequate to prevent jurors from acting "solely out of bias and prejudice " Brief of Petitioner at 40

This indictment is leveled against the American people, a cross-section of whom sit on juries daily across the country Into their hands we place the fates of the poor and the powerful Our reliance on their common sense as well as their

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[9]This issue is especially appropriate for the type of experimentation and interstate competition described by Justice O'Connor, *supra* Punitive damage law is self-moderating to the extent that states which become known as too "hard" on business lose the ability to attract and retain businesses Moreover, those arguing for limits are not without access to the political process The array of major corporations, organizations and coalitions appearing as amici in support of Petitoner should itself reassure the Court that the arguments for limiting punitive damages receive a hearing

sense of the conscience of the community, extends even to ultimate decisions of life and death *Witherspoon v. Illinois*, 391 U S 510, 518 (1968)

How wisely do juries exercise this discretion? The largest empirical study of actual jury performance, sponsored by the Roscoe Pound Foundation, found

> Juries overwhelmingly take their duties seriously Juries are evidence-oriented with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases The evidence also strongly suggests that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy

J Guinther, The Jury in America 102 (1988)

The study concludes that "juries are, on the whole, remarkably adept as triers of fact Virtually every study of them, regardless of research method, has reached that conclusion " *Id.* at 230 *Cf., Duncan v. Louisiana*, 391 U S 145, 157 (1968)("the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them," citing H Kalven and H Zeisel, The American Jury (1966)

ATLA suggests that the decision of West Virginia and other states to allow juries to assess punitive damages without a predetermined limit can scarcely be viewed as irrational

2. Substantive Limits Conflict With The Seventh Amendment Right To Trial By Jury.

The proposal urged by TXO would require judges to reexamine punitive damage verdicts, otherwise supportable under state common-law standards, under a substantive federal constitutional standard to be announced by this Court

The Seventh Amendment to the U.S. Constitution provides:

> In suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. vii.

Not only does reassessment of a jury's punitive damage verdict appear to conflict with the text of the amendment, there is at least some historical indication that part of the "specific intent" of the Antifederalist proponents of the provision was to preserve the type of broad jury discretion approved in the original punitive damage cases, *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763) against encroachment by federal judges. A. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991).

Inasmuch as the Seventh Amendment does not apply to the states, Amicus does not argue that substantive limits on jury awards violate the federal right. It is worth noting, however, that a number of state courts have held that legislative limits on punitive or noneconomic damages violate *state* guarantees of the right to trial by jury. *See, e.g., Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991), *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). The issue before this Court, however, is whether the Due Process Clause mandates substantive limits on juries. On the question of what process is due, specific constitutional provisions are, at the least, highly indicative. *Haslip*, 111 S. Ct. at 1052-53 (Scalia, J., concurring).

Amicus suggests that substantive limits on punitive damages, contrary to prevailing common law practice and in apparent conflict with the Seventh Amendment, cannot be

deemed so fundamental to the Anglo-American scheme of ordered liberty as to be essential to due process.

III. THIS COURT SHOULD NOT IMPOSE A SET OF SPECIFIC PROCEDURAL REQUIREMENTS GOVERNING PUNITIVE DAMAGE CASES UNDER STATE LAW.

A. Jury Consideration Of The Wealth Of The Wrongdoer Is A Matter Of State Law Rationally Related To Legitimate Objectives.

TXO also contends that it was deprived of procedural due process in this case. Its primary complaint is that the jury was instructed to take into account the assets of the tortfeasor in determining the amount necessary to punish and deter the misconduct. TXO asserts other errors with regard to the jury instructions and the judicial review of the award.[10] Other amici urge this court to adopt a variety of procedural devices to protect defendants. Irrespective of the wisdom of some of these proposals, ATLA submits that they are more properly addressed to the states, rather than to this Court under the Due Process Clause.

The financial condition of the wrongdoer is clearly relevant to a determination of the amount of punitive damages reasonably necessary to punish and deter the wrongdoing. Restatement (Second) of Torts §908, comment e (1977). This Court itself has stated that

> By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, *based on his personal financial resources*, [42 U.S.C. §1983] directly advances the public's interest in preventing repeated constitutional deprivations.

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[10]To the extent that many of these contentions are limited to the circumstances of this case, Amicus will not add to the arguments ably advanced in the Brief of Respondents.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981)(emphasis added).

The Alabama scheme which this Court found compatible with due process included consideration of the "financial condition" of the tortfeasor. *Haslip* at 1045. Although evidence of wealth carries some potential for prejudice, "an increasing majority of jurisdictions allow evidence of the defendant's wealth to be presented to the jury." L. Schlueter and K. Redden, Punitive Damages §5.3(F)(2d ed. 1989). *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981)("evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded.") Indeed the dissent in *Haslip* would *require* that juries be instructed that the defendant's financial in relevant. 111 S. Ct. at 1061 (O'Connor, J., dissenting).

West Virginia has long followed this practice. *Pendleton v. Norfolk & W. R. Co.*, 95 S.E. 941 (W. Va. 1918). The relationship between this evidence and the purposes of punitive damages was recently and succinctly enunciated by Justice Neely for the West Virginia Supreme Court of Appeals. "Jeff's Hot Dog Stand, which serves a local neighborhood, will be affected more strongly by a $20,000 punitive damages award than will McDonald's." *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). ATLA submits that this state rule satisfied due process under the same standard this Court applied to Alabama's rule imposing vicarious liability on corporations for the acts of agents. *Haslip*, 111 S. Ct. at 1032 ("We cannot say that this does not rationally advance the state's interest . . .")

B. Procedural Due Process does not require this Court to establish a detailed scheme governing civil cases.

This Court need not address the various procedural safeguards urged upon it by TXO and its supporting amici. Not every improvement to the justice system, however wise or sensible, is thereby essential to fundamental fairness.

Every litigant in a civil case, plaintiff or defendant, is entitled to due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). In contrast to its criminal procedural mandates, this Court has delineated the process which is due in civil lawsuits in only broad and elemental strokes. In civil actions, due process is satisfied by "traditional notions of fair play and substantial justice." *Burnham v. Superior Court*, 495 U.S. 604 (1990), including notice, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), a meaningful pre-deprivation opportunity to be heard, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985), and a neutral decisionmaker, *Tumey v. Ohio*, 273 U.S. 510 (1927).

This Court has admonished that the Fourteenth Amendment does not impose "a rigid constitutional code of procedural necessities," *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985). "There is no requirement as to exactly what procedures to employ whenever a traditional judicial-type hearing is mandated." *Parham v. J.R.*, 442 U.S. 584, 608 n.16 (1979). This Court has consistently "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Daniels v. Williams*, 474 U.S. 327, 332 (1986), quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

The Court did not depart from these principles in *Haslip*. The Court held "the traditional common-law approach," of assessing punitive damages, in view of its longstanding acceptance by this Court and "every state and federal court that has considered the question" does not violate due process. 111 S. Ct. at 1043.

The Court then reviewed the detailed requirements established by Alabama for punitive damage claims and concluded that Pacific Mutual "had the benefit of the full panoply of Alabama's procedural protections. Id. at 1046. It is plain, though perhaps not explicit, that the Court described

the Alabama procedures as illustrative of a scheme which complies with due process. In addition, Alabama having adopted these safeguards, Pacific Mutual was entitled to compliance. The Court nowhere indicated that any of these specific procedures were essential to due process. *Cf.* 109 S. Ct. at 1047 (Scalia, J. concurring)(the majority opinion offers "no guidance" as to the constitutionality of other procedures).

The Due Process Clause is not "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885).

At the very heart of the arguments of TXO and the tort reform amici is a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict the reformers' dark and cynical portrait of our civil justice system. Nevertheless, they urge this Court to cast away guiding principles of due process, federalism, and the common law tradition. The myth is wrong. Due process of law finds no higher expression than in the independent civil jury.

CONCLUSION

For these reasons, ATLA urges this Court to affirm the judgment of the Supreme Court of Appeals of West Virginia.

Respectfully submitted.

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October Term 1985

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Appeals
of West Virginia

BRIEF OF CENTER FOR AUTO SAFETY
AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court should modify its decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991) and adopt a constitutionally fixed ratio between compensatory and punitive damages as a means of limiting the size of punitive damage awards generally?

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IN THE

Supreme Court of the United States

October Term 1992

No. 92-479

TXO PRODUCTION CORP.,

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v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR CENTER FOR AUTO SAFETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Center for Auto Safety (CAS) is a non-profit corporation based in Washington, D.C. The CAS is committed to motor vehicle safety and to the support nationally of measures that will reduce death, personal injury and economic loss on the highways. An important CAS concern is the promotion of legal standards that effectively and fairly deter automobile and truck manufacturers — domestic and foreign — from marketing vehicles that are unsafe in design. Because the decision in this case will have a significant impact on the interests of automobile and truck users in this country, the CAS believes that its views on the deterrence role of punitive damages in product liability litigation would be of assistance to the Court.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court as required under Supreme Court Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

CAS will rely on the statement of facts set forth in Respondents' brief. It will argue three points. First, the rationale and holding of *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991) are fundamentally sound and should be retained. There is no constitutional justification for supplementing *Haslip* with a judicially fixed ratio test which bases punitive damages *exclusively or predominantly* upon the amount of compensatory damages awarded. The propriety of any punitive damages verdict is a question of evidentiary sufficiency which must be judged on a case-by-case basis in light of each state's governing legal standards. Second, to decide whether an award of punitive damages is excessive within the *Haslip* framework, an appellate court should consider: (1) the evidence and arguments actually advanced *at trial* concerning the award of punitive damages, including those relating specifically to the the amount of the award; (2) the extent to which defendants in litigating the punitive damages issue took full advantage of all available procedural safeguards *at trial*, particularly the right to bifurcate; and (3) the extent to which the defendant's case at the appellate level rests on arguments and data *not* presented to the jury or to the trial judge. Third, CAS will profile a major product liability case involving defective gas tank placement to illustrate why the West Virginia standards for awarding punitive damages are not merely rational in the substantive due process sense, but serve *compelling* social goals when applied to a wrongdoer who acts with: (1) the intent to do serious harm or with an awareness of the potentially serious consequences of the wrongdoing: (2) an expectation of deriving profit from the wrongdoing; and (3) the understanding that

its social, political or economic standing would make it difficult for a victim of such wrongdoing to gain effective legal redress. Under a judicially fixed ratio test, punitive damages cannot adequately deter in such cases.

ARGUMENT

When this Court ruled in *Haslip*, it recognized that the award of punitive damages poses a marginally greater risk of error than is inherent in other fact finding functions traditionally assigned to the jury. *Haslip* did not constitutionalize punitive damages standards. Instead, the Court stressed the importance of the *procedural* structure within which the trial jury is asked to calculate punitive damages. Accepting Alabama's *general* standards for awarding punitive damages as constitutionally valid, the Court found the safeguards surrounding such awards adequate to protect civil defendants from arbitrary or irrational jury decisionmaking. Notably, these safeguards were multi-tiered; they applied not only to the conduct of the jury trial itself but to post trial and appellate review as well. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1042-45 (1991).

In CAS's view, Petitioner ultimately seeks to transform *Haslip* from a procedural to a substantive due process holding. Supported by many of the amicus briefs, Petitioner argues that *Haslip*, barely two years old, is unworkable because of its "unpredictability" and the persistence of jury verdicts "run wild". Throughout Petitioner's brief, there is a consistent emphasis is on a single factor formula: the ratio between compensatory and punitive damages.[1] This is a *substantive* due process argu-

[1]Ratios are mentioned repeatedly in the text of Petitioner's Brief. *See, e.g.*, pp. 4, 6, 7, and 8. Appendices A, B and C are similarly designed to highlight the ratio between actual and punitive damages. Petitioner appears to prefer a ratio limit no higher than 4 to 1.

ment and, as such, it is an extraordinary proposition. If adopted, the ratio test — in the interests of increasing predictabiity for the very worst of civil wrongdoers — would diminish to the point of irrelevancy the varied factors now considered pertinent to the determination of punitive damages in West Virginia and in many other states. The cost in some cases would be a severe restriction upon the state's ability to advance the basic goals which punitive damages have long been thought to serve: punishment and deterrence.

Although CAS acknowledges the amount of harm actually inflicted by a civil wrongdoer can and, in some cases, should have a significant bearing on the jury's calculation of punitive damages, a ratio test would tend to overstate the importance of that factor across the board. Paradoxically, it would provide the greatest immunity from sanction to wrongdoers who are the least deserving morally and perhaps the most dangerous.[2] This "protected" class would consist of wrongdoers whose misconduct: (1) poses serious health or safety risks to the public but which happens not to have caused serious harm; (2) has been profitable to the defendant or was believed by the defendant when undertaken to be potentially profitable; or (3) has been committed repeatedly without civil or criminal sanction and which the defendant stubbornly refuses to admit is unlawful. Under traditional due process

[2]In West Virginia as in most jurisdictions, the standard for imposing punitive damages is intentional misconduct or misconduct reflecting an awareness of possible harm — physical or monetary — to third parties. The requirement of a culpable mental state is what distinguishes merely negligent conduct from conduct which shows contempt for or indifference to society's norms. Much conduct justifying the award of punitive damages could, at least in theory, be punished criminally. Civil defendants however, do not face the possibility of incarceration. In challenging punitive damage verdicts as excessive, rarely do they place any monetary value on the avoidance of incarceration.

standards, the imposition of punitive damages against this class of defendants must be regarded as rationally related to the assessment of puntive damages and hence within the power of the states to enact and enforce.[3] Even under heightened substantive due process standards which do not apply to the award of punitve damages,[4] the state possesses a *compelling* basis for imposing monetary sanctions to deter and punish intentional misconduct or misconduct undertaken with an awareness of its potential for harm to others.

Petitioner actually recognizes that on these terms its *substantive* due process argument cannot succeed. The Petitioner argues that case-by-case determination of punitive damages, including post verdict judicial oversight at the trial and appellate levels, is inherently unfair and must be modified if not superseded altogether. In short, the *Haslip* emphasis on tightening up *procedural* safeguards is unworkable and, according to TXO, therefore supplementary *substantive* rules limiting the award of punitive damages may be imposed. This is a novel basis for invoking heightened substantive due process review by this Court. Before taking Petitioner's invita-

[3]Regardless of whether these policies are legislatively or judicially established or are a combination of the two, they reflect the lawful policy choices of the state. These general policies, as distinguished from their case-by-case applications, must be sustained as long as the minimal rationality test of this Court is satisfied. *See, City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

[4]In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), this Court recognized that substantive due process principles require heightened judicial review in situations outside the context of abortion and reproductive rights. The Court, however, cautioned that the occasions for such extraordinary judicial intervention would be rare. The values so recognized and given special constitutional protection have to be deeply rooted in the traditions and mores of our society. Under this view of substantive due process, *Haislip* exhibits a deference to the long standing authority of the jury to decide punitive damages in the first instance. Petitioners in fact want to discard that tradition.

tion too seriously, however, the Court should look long and hard at how the punitive damage issue is litigated. In CAS's view, the relevant comparison is how the issue is *actually* defended in front of the jury as opposed to how it is *actually* litigated at the post-trial and appellate phases. There is a striking difference between the two stages in many cases and this is frequently the result of litigation strategy or lack thereof on the part of defense counsel. A substantial award of punitive damages therefore does not automatically signify a defect in state law.

CAS suggests that defense counsel frequently default on the punitive damages issue in front of the jury. Defense counsel rarely take full advantage of the right to seek bifurcation on the punitive damages question. In some cases such as the present one, incredibly, they do not seek bifurcation at all.[5] In any event, whether or not the trial is bifurcated, defense counsel in a surprising number of cases choose *not* to present

[5]Although some states now mandate trial bifurcation when punitive damages are sought, *see, e.g.*, O.C.G.A. § 51-12-5.1, most jurisdictions permit bifurcation under a civil practice rule similar to Rule 42(b) of the Federal Rules of Civil Procedure. The advantages of trial bifurcation while well recognized are for some reason not yet widely utilized. 3 J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice*, ¶¶ 12.01 to 12.06 (1992).

In this case, TXO was actually afforded bifurcation as the trial court first handled TXO's declaratory judgment action, and then submitted Alliance's counterclaim for slander of title to the jury. Importantly, however at the second trial, TXO did not avail itself of further procedural safeguards against jury prejudice by requesting that the jury's determination of liability on the counterclaim first be rendered prior to considering the issue of punitive damages. *See*, W.Va. Rule 42(c), W.V.R.C.P., and *State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.Va. 1992)

evidence to the jury in mitigation of punitive damages.[6] Indeed, defense counsel often don't bother to introduce mitigating evidence even when arguing for remittitur to the trial judge who sits as a thirteenth juror with the authority to prevent miscarriages of justice. This pattern of omission or timidity seriously undermines Petitioner's challenge to *Haslip*.

To decide whether a jury has acted in accordance with prevailing law in awarding punitive damages, a reviewing court should examine the trial record with an attentive eye toward the following factors:

1. In jurisdictions where trial bifurcation is not mandatory, did defense counsel ask for bifurcation on the issue of punitive damages?

2. During pretrial discovery, how did the defendant respond to efforts to secure information about the profitability or potential profitability of the alleged course of misconduct? This information would provide an objective basis for assessing what it would take to penalize or deter a defendant for intentional misconduct or conduct undertaken with an awareness of a serious threat of harm to others. If defense counsel elect to litigate the punitive damage question without introducing this information or by actively resisting its discovery, complaints about unfairness have significantly less force. Defense counsel ignore the practical burden of evidentiary production at their peril. The jury, after all, can only decide the punitive damage issue based on evidence made available to it by the litigants.

[6]In context of capital punishment cases, which are always bifurcated on penalty, it is almost *per se* ineffective assistance of counsel to defend against the imposition of the death penalty without introducing evidence in mitigation. *See, e.g., Jones v. Thigpen*, 788 F.2d 1101 (5th Cir.1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985). How can defense counsel (when they do the same thing in a case involving a substantial award of punitive damages) argue that the result is due to a deficiency in the law rather than a deficiency in the representation?

3. What was plaintiff's theory for the award of punitive damages at trial? What evidence supported that theory?

4. How did defense counsel respond at trial to plaintiff's evidence in support of the award of punitive damages? For example, did defense counsel elect simply to impeach by cross examination? Or did they introduce contradictory evidence? Did defense counsel pursue a strategy of mitigation and offer testimony about punitive damage verdicts in analogous cases; the range of monetary fines for criminal conduct in the state; or punitive damages awards paid in other cases for the same course of misconduct? Did the defendant at any point cease engaging in the misconduct and take steps to remedy its effects, to advise the public of the risks or otherwise show concern for the interests of third parties, including the plaintiff? If evidence, as described above, was not presented to the jury, what explanation does the defendant have for that strategic choice? The state can only give civil defendants an opportunity to litigate the punitive damage issue before the jury; the state cannot force them to use it wisely.

5. At the post verdict phase, what *additional* evidence, if any, did defense counsel ask the trial judge to consider in deciding whether to reduce the punitive damages award? If *additional* evidence was not offered at this point, why not? If it was, why were the evidence and the arguments based upon it not first presented to the jury. In some cases, the defendant will have made a conscious decision to bypass the jury. In other cases, the explanation may be oversight. Nevertheless, it worth noting that in *criminal* cases, which Petitioner notes in its brief, this type of trial level default has dire consequences. Even when the imposition of the death penalty is at stake, such default has presented a formidable, if not insurmountable, bar to appellate and post conviction

review.[7] Surely, there is nothing procedurally unfair about similarly binding civil defendants to the legal and evidentiary arguments made at the trial level concerning the award of punitive damages.

TXO overstates its attack on *Haslip*, especially when it is realized that civil defendants litigate a far different case at trial than on appeal. It is unreasonable to belittle *Haslip* and its acceptance of traditional state schemes for imposing punitive damages when civil defendants do not aggressively use the procedural and substantive tools available to them to persuade the jury. CAS urges this Court to examine with care the litigation process in the case at hand before it finds fundamental fault with the law. *Haslip* is sound and should be retained without modification.

CAS believes acceptance of Petitioner's approach to punitive damages would have a major — and decidedly negative impact — on product liability litigation against automobile and

[7]In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court announced a stronger procedural default rule in habeas corpus cases than previously had been recognized. The point was that a litigant shouldn't be allowed to "sandbag" in state court and then raise new issues in federal habeas corpus proceedings. The assert-it-or-forego-it principle has been reaffirmed by this Court many times since 1977. Recently, in *Coleman v. Thompson*, 111 S.Ct.2546 (1991), the Court applied its procedural default rule in a capital case in which Coleman's attorney failed to file a notice of appeal within the 30 day time limit established by the Virginia Supreme Court Rules. It would be hard to imagine a more hard nosed application of the procedural default rule than in *Coleman*. Yet, this Court said that when the state is under no constitutional obligation to provide representation, the risk of attorney inadvertence or incompetence had to be borne by the client. That argument has force in the context of the TXO case. *See also McLesky v. Zant*, 111 S.Ct. 1454 (1991).

truck manufacturers. A ratio test does offer the enticement of predictability. But it is a predictablity that enables the manufacturer to guage with dismaying accuracy the cost of remedying a defective vehicle against the cost of concealing or denying the existence of the defect. This calculus was central to the jury's determination of punitive damages in *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981) and *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984). In these cases, both of which involved highly dangerous gas tank placement, there was evidence of serious corporate misconduct and significant financial benefit to Ford Motor Company resulting from its failure to correct a known defect. Yet, as substantial as the punitive damages awards were in both cases, there is a real question whether the awards had sufficient financial impact on Ford to deny them the profits from their misconduct. In short, while Ford may have lost those cases in a legal sense, its financial calculus may have been vindicated. CAS suggests the use of the ratio test would make it even less likely Ford today would have to answer fully for its wrongdoing.

In a very recent gas tank placement case involving a General Motors pickup truck, the jury awarded $101,000,000 in punitive damages. This verdict came after the jury awarded the plaintiffs $4,241,611.84 in compensatory damages for the full value of the victim's life and $1 for the victim's pain and suffering. *Moseley et. al. v. General Motors Corp. et al.*, State Court of Fulton County, Georgia, Case No. 90-V-6276. Under Georgia law, punitive damages are allowed in pain and suffering but not wrongful death actions. Under TXO's ratio test, therefore, the base for determining punitive damages would be the $1 award for pain and suffering; the $4.24 million verdict reflecting the full value of victim's life would not be considered. Despite the enormity of GM's apparent misconduct, the ratio test would authorize punitive damages in an

amount ranging from $3 to whatever the Petitioner's believe the upper limit on the ratio should be. Such an outcome would conflict with *Haslip's* clear acceptance of traditional state grounds for determining damages. The value of predictability would override deterrence and punishment.

Listed below are some of the key facts supporting the punitive damages award in the Moseley case:

1. The trial was bifurcated as required by Georgia law. In the initial phase of the trial, the jury determined liability on all claims, including the plaintiff's entitlement to punitive damages. At that point, it returned a verdict for compensatory damages only. In the second phase of the trial, the plaintiff can offer additional evidence relating to the amount of punitive damages; the defendant can offer evidence in mitigation. After a second round of argument in *Moseley*, the jury fixed the amount of punitive damages. Despite bifurcation, counsel for GM introduced no evidence at the second phase.

2. In litigation involving the safety of the gas tank placement in GM's pickup trucks, GM did not disclose during discovery in non-*Moseley* cases that it had crash tested 24 trucks between 1981 and 1983 and at least 22 of the 24 trucks had failed the test because the tanks ruptured upon side impact.

3. Plaintiff introduced evidence that went largely uncontradicted about GM's knowledge of the defective placement of the side mounted gas tank (outside the frame) and GM's decision not to recall the trucks or to make the public aware of the concomitant danger of fuel fed fire. Among the key items of evidence that the jury could have weighed in favor of awarding punitive damages against GM:

—GM violated its own internal fuel tank placement standards by failing to provide enough crush space for the tank

and by failing to eliminate puncture producing objects surrounding the tank;

—GM tested the location of the gas tank outside the frame before adopting the side mount design and found that trucks in three of four tests failed;

—GM ignored competitors' brochures promoting the safety of inside the frame gas tank location;

—In 1974, only *one year* after the side mount design is implemented, GM conducted a comparative study of trucks sold prior to 1973 and trucks sold having the side mount design and the data revealed an increase in gas tank leaks after side impacts in models having the side mount design.;

—In 1978, another GM statistical study showed that an inside the frame designed was needed to eliminate "leakers";

—GM engineers reported data to management suggesting that best tank location would be in "the rear" of GM trucks;

—From 1981-83, GM conducted an extensive crash testing program on trucks having side mount design and observed that at least twenty two out of the twenty four trucks tested failed;

—In 1982 GM engineers estimated the costs of moving the gas tank inside the truck frame and the anticipated lead time, but rejected the idea;

—GM sent its expert engineer Ron Elwell to testify in gas tank placement product liability case in May 1983, but did not tell him about the results of the crash tests;

—GM legal teams during 1983, according to trial testimony, instructed engineers to remove sensitive design documents (about side mount tank placement) from their files and to destroy them;

—GM begins adding "stone shields" (plastic liners) to its 1984-87 models, yet does not tell the public that the shields are to help reduce gas tank ruptures due to side impact accidents;

—In 1983 GM engineers tell Ron Elwell that the side mount placement of the gas tanks on GM trucks is "not defensible" and also disclose the results of the twenty-four crash tests, some of which showed ruptured gas tanks looking like "split melons";

—In 1983 GM acknowledges that outside the frame gas tank design is more vulnerable than inside the frame design yet GM does not recall the trucks;

—In 1983 GM plans to move the gas tank inside the truck frame for "added protection in side impacts";

—In 1987 GM notes that inside the frame gas tank placement will "give added protection in side impacts";

—Despite the foregoing evidence concerning the design of its trucks and the pattern of injury and death associated with gas tank ruptures and fuel fed fires, GM does not warn or recall for fifteen years;

—GM engineers told not to put questions about products in writing, and told that question of safety-related defect was a managment decision, not an engineering decision;

—GM sued over one hundred times concerning its side mount tank design, but instead of recalling the trucks, GM confidentially settles most of the cases;

—Statistical studies show that of 250 who people died in GM trucks over 180 would have lived had GM abandoned its side mount gas tank placement;

—GM executives tell jury that customers have no right to know of the dangers disclosed to GM by its own crash testing program or the analyses by GM engineers;

—In responding to NHTSA's recall investigation, GM provides NHTSA with misleading statistical study that purports to show how safe the gas tank design is, but GM has to withdraw study when the Insurance Institute For Highway Safety points out that it is misleading and skews data in GM's favor.

4. General Motors put up few witnesses in its case-in-chief and none at the punitive damages phase of the trial. All but one testified that the accident victim died instantaneously. If the jury had credited this testimony, it would not have been authorized to find any pain and suffering and thus could not have awarded punitive damages. GM basically conceded the wrongful death claim in hopes of avoiding punitive damages. When that strategy failed, GM literally had nothing to say to the jury during the second phase of the case except to argue lamely for mercy. The entire closing argument of GM is reproduced in the appendix. If this argument had been presented in the penalty phase of a death penalty case, it probably would have been deemed ineffective assistance of counsel. This plea for mercy technique is much more common in the defense of punitive damage claims than one might expect. Bear in mind that GM was well aware the jury was going to place a monetary figure on punitive damages and yet did nothing to suggest what an appropriate figure might be.

5. At this juncture, GM has not filed any post trial motion specifying constitutional grounds for reduction of the punitive damages award. Nor has GM at this point indicated whether it might attempt to introduce evidence in support of such a motion.

CONCLUSION

CAS trusts that this profile helps the Court to understand that TXO's harsh view of juries may be unjustified. TXO's desire for predictability is understandable because TXO wants perhaps to know in advance the maximum cost of misconduct. State policies regarding the award of punitive damages reflect quite different concerns. Wrongdoers are required to pay in proportion to the harm done or attempted with heavy consideration being given to the extent of any financial benefit that accrued or was contemplated. *Haslip* should not be modified at this point. The decision reflects practical wisdom. The judgment below should be affirmed.

Respectfully submitted

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March 3, 1993

APPENDIX

Closing Argument of Counsel for General Motors Corp. in *Moseley, et al. v. General Motors Corp., et al.*

This is the last time I'll stand before you. I'm not going to re-argue the case, you'll be glad to hear. There's nobody that's got anything to do with this case that knows the evidence as well as you do. You've sifted it, sorted it, you've lined it up, you've analyzed it. We, everybody that's had anything to do with this case, we take our hats off to you for working so hard.

At the beginning of this trial I stood here and I said that I believe in the jury system and General Motors believes in the jury system. We believe in the jury system. There is no better way. We believe it is a crushing blow that you've delivered us. It's tough — let me say this. It's a crushing blow, we respect it, we accept it. It's tough to stand here in front of more people than I like to know are watching and to say that your decision is going to make us a better company, but it will.

We're going to find an independent lawyer to look into some of the document things and let the chips fall where they may, and if somebody finds that a lawyer did something he shouldn't have done, he's history and you can take that to the bank.

We're going to sit down with the people at N.H.T.S.A. and spend as much time as it takes and go over — we never had a strap thing like this before, but we respect your decision and we're going to immediately see what can be done about that.

Our company is changing, as a lot of you know. There's been talk about corporate mentality. You sent a message, we have got the message, we have got the message and I'm going to say again what you said to us is going to make us a better company, and it ought to.

There isn't any sense in me standing here for fifteen or twenty minutes. It isn't needed. You know, I can see by your faces you know this case, you don't need any more talking by Fred Bartlit or General Motors; you've got it. I'm not going to do that. I'm going to say that we have the deepest, deepest sympathy for this tragedy, the deepest sympathy for the Moseleys.

I want to thank the jury for your tireless service. You have the gratitude — I'm not going to say again the things I said about what you all gave up, and it's real easy when you have a few disagreements to go home and say what the heck, I'll give up. Nobody did that. Everybody stood by their positions.

What I'm going to say about the amount, I guess what I'm going to say is we're going to put ourselves, like we have from the beginning, in the hands of the twelve people that know more about this case than any other twelve people.

And I guess that's it. I feel like — I've been doing this for a number of years and I feel like I ought to have some great inspiring statement to make, but I think that the inspiring statement is the hard work you've done. There's nothing I can do. Abraham Lincoln said there's nothing we can add to it or detract from it, and we thank you for that and, you know, we put ourselves in your hands, where we've been from the beginning.

Thank you.

Supreme Court, U.S.
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No. 92-479

In The

Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORPORATION,

Petitioner,

vs.

ALLIANCE RESOURCES CORPORATION, TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE,

Respondents.

On Writ Of Certiorari To The Supreme Court Of West Virginia

BRIEF OF TRIAL LAWYERS FOR PUBLIC JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in environmental protection, civil liberties, consumer safety and employee protection. Supported by more than 1,300 trial lawyers throughout the United States, TLPJ is the only public interest law firm in the nation dedicated to using plaintiffs' tort law and trial law for the public good.

TLPJ strives to achieve social change and vindicate individual rights by ensuring that wrongdoers are punished for their misconduct. Most emphatically, punitive damages are a vital weapon in TLPJ's campaign for justice. Accordingly, TLPJ respectfully submits this brief in support of respondents in this case.[1]

SUMMARY OF ARGUMENT

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 1041-42 (1992), this Court recognized the integral role played by punitive damages in the law of torts to accomplish the laudatory purposes of punishment and deterrence. In approving the constitutionality of Alabama's system of post-verdict review of punitive awards, the Court observed that the Alabama system "ensures that punitive damages are not grossly out of proportion

[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

to the severity of the offense and have some understandable relationship to compensatory damages." 111 S.Ct. at 1045. TXO's Amici have now seized upon this *dicta* and claim that it somehow requires creation of a substantive due process right that limits punitive damages in every case to an arbitrary multiple of compensatory damages. Not only does this suggestion fly in the face of this Court's refusal in 1989 to impose an arbitrary limit on punitive damages, *see Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), but such a rule, if adopted, would often defeat the salutary goals of punitive damages – deterrence and retribution – in many cases.

Even those states which have, as a matter of common law, required punitive damage awards to bear a "reasonable relationship" to compensatory damage awards have found implementation of the requirement problematic at best. Experience has demonstrated that, in reality, what is appropriate to compensate the victim frequently bears no relationship to what is appropriate to punish and deter the wrongdoer, much less to deter other potential wrongdoers similarly situated. Accordingly, it makes little sense for this Court to establish any new substantive due process right requiring punitive awards to bear any specific relationship to compensatory damages – and even less sense to create such a right limiting punitive awards to a specific multiple of compensatory awards.

Generally speaking, the factors relevant to determining the amount appropriate to punish and deter are the degree of reprehensibility of the defendant's conduct, the profitability of the conduct, the severity of the threatened harm, and the financial position of the defendant. When these factors are subsumed into a rule limiting punitive

awards to a multiple of compensatory damages, or any other arbitrary relationship, the purposes underlying punitive damages will not be served. Such a limitation will prevent juries and courts from tailoring punitive awards to fit a defendant's particular conduct. Further, the limitation will often result in punitive awards that are smaller than necessary to deter future tortious conduct. This is of particular concern in cases where a defendant's malicious conduct causes a small degree of harm to a great number of people, as in insurance bad faith and consumer fraud cases.

A limitation on punitive damages also will reduce the present ability of tort cases to deter wrongful conduct where the defendant has been required to pay modest punitive damages for the same conduct in the past, but has nonetheless continued such conduct. The proposed limitation on punitive awards would be especially detrimental in the products liability context because it would allow manufacturers to calculate their maximum liability in advance, and to incorporate punitive damages as another item in the cost of doing business. Finally, the limitation of punitive damages to an arbitrary multiple of compensatory damages would eliminate an important incentive for individual plaintiffs to pursue their claims against tortfeasors who have engaged in outrageous conduct, thereby ensuring that many claims, particularly smaller claims involving private consumers, will be unredressed by the courts. In such an event, our entire society will bear the brunt of the misconduct of tortfeasors unrestrained by moral conscience or by effective punitive damages.

ARGUMENT

THIS COURT SHOULD NOT ESTABLISH A NEW SUBSTANTIVE DUE PROCESS RIGHT LIMITING PUNITIVE DAMAGES TO AN ARBITRARY MULTIPLE OF COMPENSATORY DAMAGES.

This Court recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991), that, for two hundred years, punitive damages have been employed as part of state tort law to accomplish the laudatory purposes of punishment and deterrence of tortfeasors. 111 S.Ct. at 1041-42. As the Court explained, the jury has traditionally determined the amount of a punitive award in light of instructions to "consider the gravity of the wrong and the need to deter similar wrongful conduct." *Id.* at 1042. While this common law process necessarily invests the jury with considerable discretion, that discretion is not unfettered. Historically, both the trial and appellate courts review any punitive award to "ensure that it is reasonable." *Id.*

In reviewing the reasonableness of a jury's punitive award, some courts have considered, as one of several factors, whether the award bears a reasonable relationship to the compensatory award. *See, e.g., Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988). This Court, while mindful of that fact, has previously refused as a matter of constitutional law, to "craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages. . . . " *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The Court has, however, in recently approving the constitutionality of Alabama's system for post-verdict review of punitive awards, observed that the Alabama system "ensures that punitive

damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S.Ct. at 1045.

TXO's Amici[2] now seek to parlay that language into a substantive due process right to limit punitive damages in every case to some arbitrary multiple of compensatory damages. Yet even those states with a common law requirement that punitive damages bear a reasonable relationship to compensatory damages have found it problematic. Because the amount appropriate to punish and deter has no necessary relationship with the amount of compensatory damages, the "reasonable relationship" rule has often been applied arbitrarily, or ignored entirely, rendering that rule completely meaningless. To suggest that the Constitution now requires this Court to adopt such a rule or go further and mandate the robotic application of a rule that would limit punitive awards in every case to an arbitrary multiple of compensatory damages would, in many cases, defeat the very purposes underlying punitive damages – deterrence and retribution.

---

[2] Interestingly, it is not petitioner TXO but TXO's Amici who urge upon the Court the adoption of an arbitrary ratio between punitive and compensatory damages as part of a newly created substantive due process right.

A. The Relationship Between The Punitive Damage Award And The Compensatory Damage Award Does Not Reflect Whether The Punitive Damage Award Is Appropriate In A Particular Case.

While it is true that this Court voiced concern in *Haslip* with the relative size of the jury's compensatory and punitive awards, 111 S.Ct. at 1046, this Court in no way suggested that such concern would give rise to a substantive due process right to curtailment of a punitive award to an arbitrary multiple of its corresponding compensatory award. To the contrary, the Court specifically held: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 111 S.Ct. at 1043. While we agree that the bright line standard now urged by TXO's Amici "cannot" be adopted by the Court, we would further suggest that the seemingly more benign standard requiring a reasonable relationship between punitive and compensatory damages is also one that should not be employed as an element of substantive due process in reviewing a punitive award. In fact, even the common law use of this standard, often referred to as the "reasonable relationship" or the "ratio" rule, has been rejected by the vast majority of courts and commentators to consider it. To the extent this Court mentioned the rule in *Haslip*, that discussion was *dicta*. The reference certainly provides no basis for creation of a due process right to the limitation of punitive damages to an arbitrary multiple of compensatory damages.

The commentators have criticized the "reasonable relationship" rule, arguing that, since no fixed ratio can

be mechanically applied in every case, it is impossible to know what relationship is "reasonable" merely by comparing the size of the compensatory and punitive awards. *See, e.g.*, K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 18.06 (1985); Borowsky, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F.L.Rev. 147, 154 (1983); Mallor & Roberts, *Punitive Damages: Toward A Principled Approach*, 31 Hastings L.J. 639, 666-67 (1980); Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1180 (1931); and Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 Iowa L.Rev. 1003, 1059 (1981). Further, because there is no relationship in reality between the amount necessary to compensate the victim and the amount necessary to punish and deter wrongdoers, the rule has been inconsistently applied in practice, so that "[j]udgments in which the punitive damage verdicts have hardly exceeded the actual damages have been reversed as excessive and judgments allowing punitive damages many times as great as the actual damages have been affirmed." Morris, 44 Harv.L.Rev. at 1180; Borowsky, 17 U.S.F.L.Rev. at 164. Given the limited usefulness of the "reasonable relationship" standard, and the inconsistency with which it has been applied by the courts, it has been generally recognized by commentators that the rule is in fact, "probably more often a rationalization of results than a means of obtaining them." Morris, 44 Harv.L.Rev. at 1180. *See also* K. Ghiardi & J. Kircher, at § 18.06; Ellis, 66 Iowa L.Rev. at 1060; Borowsky, 17 U.S.F.L.Rev. at 164; and Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration*, 9 Pac.L.J. 823, 846 (1978).

The courts have been no less critical. Indeed, as explained by one court, the standard is unnecessary even as a tool of rationalization:

> It is probable that the real purpose served by the "ratio" rule is to remind the reviewing courts of their power to overturn excessive damage awards. . . . But the "ratio" rule is not needed for this purpose since the appellate court is always free to determine that the punitive award is excessive, based on factors in addition to the scope of compensatory damage.

Leimgruber v. Claridge Associates Ltd., 375 A.2d 652, 657 (N.J. 1977). Similarly, the Florida Supreme Court, in rejecting the reasonable relationship requirement, criticized the rule as one conceived to be used as a "rule of thumb" in reviewing awards of punitive damages, but that is now employed "in some jurisdictions, [as] an inflexible rule of law that translates into the application of strict mathematical formula." *Lassitter v. International Union of Operating Engineers*, 349 So.2d 622, 626 (Fla. 1976). *See also Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501, 502-03 (Ga. 1991), *cert. denied*, 112 S.Ct. 1175 (1992); *D.C. Transit System v. Brooks*, 287 A.2d 251, 257 (Md. 1972); and *Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F.Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (1981). Undaunted in the face of this common law rejection of an essentially useless and arbitrary tool for reviewing the propriety of punitive awards, TXO's Amici ask the Court to go one step further and rule that the Constitution requires an even more arbitrary limitation on punitive damages. The Court should decline this invitation.

B. Limiting Punitive Awards To An Arbitrary Multiple Of Compensatory Awards Will Thwart The Purposes Underlying Punitive Damages.

We do not suggest that the discretion of the jury in making a punitive award should be boundless. Rather, we caution that the mechanical imposition of a simplistic, mathematical formula will necessarily thwart the purposes underlying punitive damages – punishment and deterrence. When tortfeasors are not punished for their past conduct or deterred from repeating such offenses in the future, it is society as a whole and not simply unlucky individuals who will suffer.

As this Court noted in *Haslip*, a jury's award of punitive damages must be tailored to advance the goals of "deterrence and retribution . . . ." 111 S.Ct. at 1044. In determining a dollar amount that will accomplish these goals, a jury (or a reviewing court) may be guided by several considerations. The fortuity of the particular harm suffered by any particular plaintiff, however, is perhaps the least relevant consideration to the issues of punishment and deterrence:

> The actual harm that occurred is at best a crude measure of the moral egregiousness of a defendant's conduct, and hence, of the punishment deserved. If degrees of egregiousness were ranked along a scale ranging from accidental "acts of God" through negligence to deliberately injurious acts, one would not expect to find any correlation between egregiousness and the gravity of the injury sustained by an individual plaintiff. Death, disabling physical injury, or substantial economic loss may result from acts that fall at any point on the egregiousness scale.

> The same is true for a minor physical or psychic injury and petty economic loss.

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 58 (1982). Similarly, as explained by Clarence Morris in his seminal article published over sixty years ago: "The history of the defendant only indicates whether it is desirable to admonish him; and his act in its setting – rather than the concatenation of events which *happens to follow* his act – is alone important in determining whether his conduct should be condemned." Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1181 (1931) (emphasis in original).

That this single factor is not particularly helpful in determining whether an award of punitive damages is rationally related to society's goals of deterrence and retribution does not mean that a court is without guidance on this question. It has been explained that "[t]he abandonment of the reasonable relationship rule would not mean that the assessment of punitive damages would be thrown to the gods. Rather, courts would be forced to balance society's interest against the defendant's interests." Mallor & Roberts, 31 Hastings L.J. at 667. Factors relevant to this inquiry include: the severity of the threatened harm, the degree of reprehensibility of the defendant's conduct, the profitability of the conduct, and the financial position of the defendant. *See, e.g., Palmer v. A.H. Robins Co.*, 684 P.2d 187, 220 (Colo. 1984).[3] It is only

[3] While the Court in *Haslip* discussed other factors in addition to these to be considered in Alabama's system of post-verdict review of punitive damages, 111 S.Ct. at 1045, the Court's opinion did not suggest that due process requires every state to include in its post-verdict review procedures a consideration of each of the factors included in the Alabama system. Indeed, we would suggest that some of the factors

through a careful consideration of these factors that an award of punitive damages can "be tailored to teach the lesson soundly" that the defendant's conduct will not be

considered under Alabama's system, including the existence of other civil awards against the defendant for the same conduct, are not relevant, much less constitutionally required for a review of punitive damages awards that comports with due process.

This case involves a single assessment of punitive damages on a record found by the state appellate court to be sufficient to support a sizable award against a party that engaged in fraudulent action intentionally undertaken. Nothing in the West Virginia court's opinion or in the brief of petitioner suggests that this case raises an issue about so-called multiple punitive damage awards, that is, successive punitive damage awards assessed against a mass producer of defective products that cause injury to numerous individuals. Nonetheless, three briefs of Amici Curiae, namely, the brief of Owens-Illinois, Inc. and Texaco, Inc., the brief for the Center for Claims Resolution and the brief of Continental Casualty Company, seek to have this Court decide in this case questions concerning multiple punitive damage awards in asbestos cases.

This Court should not, of course, decide an issue that is raised not by the parties to this petition but arises only in the briefs of Amici Curiae. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (*citing Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960)). Further, there is no factual record in this case from which this Court can make any sort of judgment about multiple punitive damages. Thus, given the fact that this Court has several times declined review of the issue, most recently in 1992 (*see Owens-Illinois v. Bolyard*, 113 S.Ct. 462 (1992) (No. 92-360)), this case would seem a particularly inappropriate time for resolution of the question. Finally, principles of comity require that this Court should refrain from deciding an issue of traditional state tort law before the highest court of the state has an opportunity to review it. *See generally Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285-86 (1970). Issues concerning punitive damages are such a part of traditional state tort law. *See Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 1041 (1991).

tolerated. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1258, 1316-17 (1976).

When these factors are ignored in favor of a simplistic rule that requires punitive awards to bear an arbitrary relation to compensatory damages, punitive awards will necessarily be limited by a single factor "unrelated to the primary reasons [punitive] damages are assessed against the defendant." *Id.* at 1317 n.291. Such a limited (and irrelevant) inquiry will undoubtedly thwart the purposes underlying punitive damages: punishment and deterrence. "A more desirable indication of the scope of the use of punitive damages should be framed in terms of the needs and efficacy of admonition, so that the doctrine could be used in the education of blunderers as well as for the discouragement of rogues." Morris, 44 Harv. L. Rev. at 1191.

1. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Limit The Ability To Tailor An Award To Fit A Defendant's Particular Conduct.

This Court in *Haslip* recognized the state's "interest in meaningful individualized assessment of appropriate deterrence and retribution." 111 S.Ct. at 1044. Indeed, the vital importance of punitive damages to the tort system stems in large part from the fact that punitive damages allow "additional flexibility for admonition, so that the punishment may be roughly adjusted to the offender." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524 (1957).

To impose a mathematical formula in lieu of the jury's guided discretion is to deprive the states of the

ability to impose "meaningful individualized assessment" of punitive damages. This is a step that many courts have refused to take. *See Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) (flexibility of punitive damages "can ensure a sufficient award in the case of a rich defendant and avoid an overburdensome one where the defendant is not as wealthy"); and *Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F.Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981) (refusal to require ratio between punitive and compensatory damages "due to the need to individualize punitive damage verdicts"). Similarly, when reviewing an eight million dollar punitive award in light of this Court's ruling in *Haslip*, one court cautioned against trading away the value of individualized judgment in each case for the ease of mechanical computation of punitive awards:

> Finally, it needs to be said that despite the moral skepticism of our age, its fascination with utilitarianism, and its tendency to apotheosize the work of the counting sciences, judging still requires judgment. Using judgment is not, as Holmes remarked in another context, a duty; it is merely a necessity. That there is some risk inherent in the enterprise does not distinguish it from any other human undertaking and cannot excuse a refusal to engage in it.

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 779 F.Supp. 994, 997 (W.D.Ark. 1991). The federal court's "judgment" in *Robertson Oil* was entirely consistent with this Court's recognition in *Haslip* that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied." 111 S.Ct. at 1044.

2. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Often Result In Punitive Awards That Are Smaller Or Greater Than Necessary To Deter Future Tortious Conduct.

The suggestion that punitive damages must bear a "reasonable relationship" to compensatory damages or that punitive damages should be limited to an arbitrary multiple of compensatory damages has been attacked most pointedly because such requirements would so often lead to punitive awards that are inappropriately small or large[4] under the particular facts of a given case. The criticism is not new; indeed, it was recognized over sixty years ago:

> The misleading character of the ratio test is emphasized when it is remembered that the "compensatory" damages are usually admonitory as well as reparative. When an act with a vicious tendency happens to result in a small injury the "compensatory" damages are necessarily small. If it must follow that the punitive damages must also be small, the total verdict might be lenient where severity is desirable. On the other hand, if the "compensatory" damages are large, the defendant is severely admonished without the addition of any punitive damages; but in such a case the ratio test counsels large

[4] As discussed in the Brief of Amicus Curiae Arthur Anderson & Co., Coopers & Lybrand, DeLoitte & Touche, Ernst & Young, KPMG Peat Marwick and Price Waterhouse, the requirement of an arbitrary ratio between punitive and compensatory damages may actually lead to excessive punitive awards where very large compensatory awards already provide sufficient punishment and deterrence. Because this facet of the issue is ably explored by TXO's Amici, the topic is not revisited here.

> punitive damages, and may result in over-severity entirely unnecessary for the proper working of the admonitory function. So the ratio test seems to be an impediment in many cases, rather than a good legal tool.

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182 (1931). The observation is as true today as it was in 1931: the imposition of a "reasonable relationship" between punitive and compensatory damages or the limitation of punitive damages to an arbitrary multiple of compensatory damages will result in punitive awards that are not rationally related to the goals of retribution and deterrence.

a. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Not Serve To Punish Or Deter Similar Conduct In Many Cases Where Compensatory Damages Are Small.

In many instances where a defendant's tortious conduct, though malicious, causes only a small degree of harm to a particular plaintiff, a punitive damage award that is restricted by the size of the compensatory award will not serve to deter future wrongful conduct by the defendant or others similarly situated:

> Indeed, the nominal-damages cases are peculiarly appropriate for exemplary damages. If no compensable harm is done even though the defendant's conduct is very wrongful, the normal admonitory function of tort law is not brought into play unless exemplary damages are assessed.

Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 529 (1957). *See also* Childres, *Remedies, 1965 Ann.*

Survey of American Law 289, 291 ("If punitive damages have a core function, it exists in the case in which compensatory damages are nominal or small").

This principle has not gone unnoticed by the courts. In affirming an award of $1.3 million in punitive damages and $5,001 in compensatory damages in a case in which a burn victim was slightly injured in a helicopter crash that occurred as the defendant hospital was transferring the victim to a burn unit in one of its own hospitals, rather than a similar unit in another, closer hospital, the Georgia Supreme Court noted that although the plaintiff's injuries had been slight, the substantial punitive award was nonetheless appropriate to deter similar conduct in future cases, given the risk of serious harm to other patients if not taken to the closest medical facility for treatment of their injuries:

> This award, therefore, is consistent both with the nature of the authority's conduct and the potential ensuing injuries. Surely the process is not rendered unconstitutional by permitting the deterrence of potentially dangerous conduct at a point in time when the injury is slight and when only nominal damages may be involved. Society's interest would seem better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided.

Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501, 503 (Ga. 1991), *cert. denied*, 112 S.Ct. 1175 (1992).

The importance of substantial punitive awards in deterring future wrongful conduct where such conduct, though outrageous, results in only limited compensatory damages is highlighted vividly by examining other cases

in which substantial punitive awards have been imposed. For example, in *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, *cert. denied*, 484 U.S. 874 (1987), the insured brought a fraud and bad faith action against its automobile insurer when the insurer delayed and ultimately refused to replace the insured's demolished car with one of "like kind and quality" in accordance with the terms of the policy. 733 P.2d at 1076. Although the insurer did finally replace the plaintiff's vehicle, the replacement car was not similarly equipped and Allstate refused to make adjustments for the difference in "blue book" values between the two cars, which amounted to $161.45. Thus, the plaintiff's actual damages were relatively small.

The plaintiff presented evidence at trial that the insurer had engaged in deceptive claims practices for up to eighteen years, by which practices the insurer shaved relatively small amounts from each insured's total loss claim filed. 733 P.2d at 1085. In particular, the insurer routinely deducted a $35.00 cleaning fee even though automobiles that had been completely demolished were not in fact cleaned. 733 P.2d at 1078. The insurer instructed its claims representatives to make such deductions under the theory that "if you could save one dollar on a million claims, you would save the company as much as a million dollars." *Id.* At the conclusion of the evidence, the jury awarded the plaintiff $15,000 in compensatory damages and $3.5 million in punitive damages. 733 P.2d at 1077.

On appeal, the Arizona Supreme Court considered the jury's award in light of a number of factors, including the nature of the defendant's conduct, its reprehensibility, the severity of the harm likely to result from such conduct, the duration of the misconduct, the degree of the

defendant's awareness of the risk of harm, concealment of the misconduct, the defendant's financial position, the profitability of such conduct, and whether the defendant had engaged in a pattern of similar unfair practices. 733 P.2d at 1080-81. Based on a consideration of all those factors, the Arizona Supreme Court held that the jury did not improperly find that punitive damages in the amount of $3.5 million were appropriate to punish the insurer for its past conduct and to deter it and other insurers from continuing to engage in such fraudulent activities in the future. The *Hawkins* decision thus sent a strong and clear message not only to Allstate, but to other insurers as well, that dishonest insurance practices would not be tolerated in Arizona. This was a message the insurance industry needed to hear; yet, the signal would have been virtually inaudible had the punitive award in *Hawkins* been limited to an arbitrary multiple of three to five times the compensatory award as now urged by TXO's Amici.

Substantial punitive awards are also useful in punishing malicious conduct that results in limited harm in the isolated instance. For example, in *Pezzano v. Bonneau*, 329 A.2d 659 (1974), the plaintiff sued the defendant auto garage for conversion after the garage refused to release the plaintiff's disabled automobile as a result of a dispute over $2.00 of an alleged towing charge. 329 A.2d at 660. The garage then made totally groundless charges to the police that the plaintiff's car was stolen and that the plaintiff was dealing in drugs. Ultimately, the plaintiff was able to retrieve his car and drive it home after repair by another mechanic for the "minimal cost of $4.00." 329 A.2d at 661. The jury awarded the plaintiff $300 in compensatory damages and $7,500 in punitive damages. The court found that the jury's award was not excessive in

view of the evidence presented. *Id.* Had the punitive award in *Pezzano* been restricted to the arbitrary multiple of the compensatory award urged by TXO's Amici, however, the defendant garage would have received little more than a slap on the wrist for conduct that was not only outrageous, but likely to be repeated if unpunished.

These cases illustrate the central problem with the new substantive due process limitation urged by TXO and its Amici: it would only come into play in cases where it shouldn't. In other words, it would only prevent punitive damage awards that both the factfinder and the reviewing court found were appropriate to punish or deter under the circumstances at hand.

b. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Not Serve To Deter Future Wrongful Conduct Where Previous Smaller Punitive Awards Had Been Insufficient to Induce A Defendant To Cease Its Tortious Conduct.

In cases involving deliberate and willful misconduct by a large institutional defendant, it is often true that only a punitive award of substance can deter the tortfeasor from similar conduct in the future. That this is true is evidenced by the fact that, in some cases where more moderate punitive awards have been imposed, defendants have continued their tortious conduct undeterred until faced with subsequent, more substantial awards.

In *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987), the plaintiff sued the manufacturer of an intrauterine device for damages arising out of her use of the Dalkon

Shield. The jury returned a verdict in the plaintiff's favor for $1.7 million in compensatory damages and $7.5 million in punitive damages. In upholding the jury's punitive award, the Kansas Supreme Court considered a number of factors, including the fact that A. H. Robins' reaction in the face of previous punitive awards had been "less than commendable." 738 P.2d at 1246. The court noted that in 1975, a jury awarded $75,000 in punitive damages against A. H. Robins in the first Dalkon Shield case to proceed to trial. At that time, Robins did not recall its product, did not warn users of the dangers, and similarly did not warn physicians. Instead, Robins reacted by destroying documents in its possession that might implicate it in future litigation. *Id.* Given that the relatively modest punitive award of $75,000 in 1975 had had no positive impact on Robins' conduct, the Kansas court affirmed the jury's assessment that an award of $7.5 million would be better tailored to suit Robins' conduct and deter similar conduct by Robins or others in the future.

The Fifth Circuit reached a similar result in *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991). In *Eichenseer*, the plaintiff filed suit against her insurer after the insurer wrongfully denied payment of the plaintiff's medical claim. Following a bench trial, the court awarded the plaintiff $1,000 in compensatory damages and $500,000 in punitive damages. 934 F.2d at 1380. On appeal, ultimately to this Court, the case was remanded for reconsideration in light of *Pacific Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). *Id.* Upon reviewing the award in the context of the factors discussed in *Haslip*, the Fifth Circuit affirmed the district court's award of punitive damages and was particularly persuaded by the fact that in 1983, a punitive award of $150,000 had been

assessed against the same insurer on the "basis of conduct remarkably similar to the egregious conduct in the instant case." 934 F.2d at 1384. The Fifth Circuit observed:

> This $150,000 award appears to have had little effect on the manner in which Reserve Life handled claims. If a lesser and comparatively small punitive damages award does not deter wrongful conduct, then a court may reason, as a matter of common sense, that a larger award is necessary in subsequent cases. The district court concluded that, because the earlier $150,000 had little deterrent effect, it should impose a larger $500,000 punitive damages award. This conclusion finds support in the record.

934 F.2d at 1384.

These two cases graphically illustrate that willful defendants often may not be deterred from their tortious conduct unless punitive awards are substantial. Accordingly, were punitive damage awards limited in every case by some arbitrary ratio to compensatory awards, many defendants would not be deterred from continuing their wrongful conduct. It is only where punitive damages can be tailored to fit the conduct of a particular defendant that punitive awards can possibly achieve the goals of punishment and deterrence.

3. The Limitation of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Provide Industry With Little Incentive To Recall Dangerous Products Or To Provide Appropriate Warnings In A Timely Fashion.

Commentators and courts alike have recognized that the imposition of uncertain punitive damages is especially important in the products liability context:

"Nowhere is the potential for a result contrary to the purpose of punitive damages greater than in the area of consumer actions. This is an area in which the claim of an individual is most likely to be so small in comparison to the cost of litigation as not to warrant court action. Coupled with this is the fact that the position of the consumer does not go unnoticed by the large companies with whom he must deal." Note, *Punitive Damages and The Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L.J. 823, 841-42 (1978). Further, where a manufacturer can predict in advance its liability within limits – as where punitive damages are capped at some arbitrary multiple of compensatory damages – the manufacturer is enabled to factor this consideration into its cost-benefit analysis of marketing a defective product. Accordingly, the imposition of an arbitrary limit on punitive damages in the products liability arena has been harshly criticized: "Although a quantitative formula would be comforting, it would be undesirable. The deterrent effect of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance." Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 666 (1980).

The underlying theme running throughout the case-law considering the issue of arbitrary limitations on punitive damages is that damages that can be fixed with any sort of precision will not deter wrongful conduct. Thus, as early as 1961, New York's highest court explained that it is the very uncertainty of punitive damages that makes them effective in deterring tortious conduct:

> In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961). *See also Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) ("Flexibility is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability").

In the context of asbestos litigation, another court stressed that, if punitive damages are limited in a way that enables manufacturers to quantify the risk associated with their activities, they may choose simply to factor that risk as a cost of doing business, rather than remove their dangerous products from the market:

> As with compensatory damages, manufacturers will then be able to predict, within certain limits, the amount of punitive damages which may result and factor this figure into a cost-benefit analysis when deciding whether to market a particular product. . . . Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages.

Leonen v. Johns-Manville Corp., 717 F.Supp. 272, 284 (D.N.J. 1989). The Colorado Supreme Court voiced similar concerns in the context of Dalkon Shield litigation:

> Indeed, one virtue of Colorado's statutory remedy of punitive damages is that, from a deterrence standpoint, the precise magnitude of cost to the offending party is impossible to project. This uncertainty of costs will undoubtedly affect

> a manufacturer's decision to introduce a product in the marketplace. If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect.

Palmer v. A. H. Robins Co., 684 P.2d 187, 218 (Colo. 1984).

Finally, the court in *Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co.*, also recognized that it is the inability to predict with certainty the specific amount of a potential punitive award that serves to encourage manufacturers to test their products adequately in the first instance:

> Punitive damages add an "open-ended" factor to the equation which company officials must take into consideration. A manufacturer will be aware of the profitability of his product but will be unable to determine whether his potential liability will range from thousands to millions to even tens of millions of dollars. Logically, this forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective product, or an untested product. Furthermore, by absorbing many of the profits which were made from producing products with less testing and fewer safety measures, punitive damages help to prevent decisions which dilute safety measures.

515 F.Supp. at 107. If punitive damages are limited to an arbitrary multiple of compensatory damages, then, manufacturers will be able to predict their liability and thus will have little incentive to recall dangerous products or to test those products adequately in the first instance.

4. The Limitation Of Punitive Damages To An Arbitrary Multiple of Compensatory Damages Would Eliminate An Important Incentive For Private Prosecution Of Outrageous Misconduct.

Another important purpose underlying punitive damages that is not often discussed by the courts or commentators is that of offering an incentive to individual plaintiffs to pursue their claims against tortfeasors who have engaged in outrageous conduct. *See* Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L. J. 823-830 (1978). The possibility of a punitive damages award encourages a plaintiff "to seek a legal remedy which he might not have otherwise pursued because of the relative insignificance of the actual damages suffered compared to the cost of litigation." Note, 9 Pac. L. J. at 830. This incentive provides a benefit not only to the individual plaintiff, however, but serves society as well by punishing and deterring undesirable conduct that escapes the reach of the criminal laws. *See id.* As one court has explained, exemplary damages offer "an incentive for private civil enforcement of society's rules against serious misconduct . . . especially when the prospective compensatory recovery is low or the expected cost of litigation is high." *Tuttle v. Raymond*, 494 A.2d at 1358-59. If punitive damages are limited to an arbitrary multiple of compensatory damages, a plaintiff who has suffered limited actual damages will have little incentive to expend the resources necessary to seek redress for his injuries through the legal process. *See* 9 Pac. L.J. at 840-41.

It has also been observed that limiting punitive damages to an arbitrary multiple of compensatory damages,

thereby deterring individuals from filing suit, will result in an allocation of legal resources that is neither fair nor efficient. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal. L. Rev. 1, 59 (1982). Professor Ellis explains that if large punitive awards can accompany only large compensatory awards, then the cost of litigating cases with potentially large compensatory awards will rise as defendants shift their resources to protect themselves in such cases. This is true even in cases where the probability of the same harm occurring to other individuals is small. Correspondingly, resources will be drained from cases where the individual loss is small, even in cases where the aggregate social loss is high, because the probability of harm to other individuals is also high. Injured victims will not bring such actions because their possible recovery – limited to punitive damages that are tied to compensatory damages – will be low. Instead, plaintiffs will only file suit in economically viable cases where compensatory damages (and punitive damages) may be very high. Ironically, these are the same lawsuits that would have been litigated even were substantial punitive damages not available. The result will be that an entire class of lawsuits will not be filed, a corresponding class of injuries will not be redressed, and the wrongful conduct producing such injuries will not be punished, or deterred.

In response to these arguments, some might cynically offer that any ruling which would result in the prosecution of fewer lawsuits would prove a benefit rather than a detriment to the nation's legal system. This overlooks, however, the fact that litigation brought to redress wrongs for which punitive damages may be awarded is almost always socially desirable. Indeed, it has long been

recognized that the cases in which punitive damages are available often involve fraud or unfair competition, and commonly present a situation in which a large institutional defendant engages in a pattern of conduct that results in relatively slight damages to a great many people, leaving the defendant assured that few people will expend the time or resources to sue, given the paltry compensatory damages that would be recoverable. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1185-87 (1931).

The desirability of encouraging such litigation is easily appreciated from a review of the type of conduct that has spawned large punitive awards in, for example, insurance bad faith litigation, *see, e.g., Hawkins v. Allstate Insurance Co.*, (imposition of $3.5 million punitive award affirmed where evidence established plaintiff damaged by insurer's practice for over eighteen years of deducting $35.00 cleaning fee from estimated value of insureds' demolished automobiles, regardless of cleanliness of cars, which practice was premised on theory that such amount would seem negligible to an individual claimant but would, when deducted from every claim filed, make an enormous sum of money for the insurer over a period of time); and *Moore v. American United Life Insurance Co.*, 197 Cal.Rptr. 878 (Cal.Ct.App. 1984) (jury award of $30,000 compensatory damages and $2.5 million punitive damages affirmed where evidence established that defendant insurer consciously engaged in practice of cheating insureds out of health benefits by obtaining incorrect opinions from treating physicians and by summarily denying insureds' claims); and in consumer fraud cases; *see, e.g., Star Credit Corporation v. Ingram*, 347 N.Y.S.2d 651

(N.Y. Civ.Ct. 1973) (court awarded full amount of punitive damages requested where evidence established that individual had been damaged by finance company that had implemented consumer fraud scheme victimizing thousands of ghetto residents over period of many years).

The possibility of the recovery of substantial punitive damages not only encourages lawsuits that help to make our society safe from fraudulent schemes consciously designed to drain our wallets; it also encourages litigation that serves to protect us from unsafe products not properly designed to prevent the loss of life and limb. As recognized by one federal court: "With respect to plaintiffs, punitive damages provide an incentive to bring suit against manufacturers who place unsafe products on the market with deliberate or reckless disregard for public safety, when a compensatory award for the harm caused would be outweighed by the skyrocketing costs of litigation." *Leonen v. Johns-Manville Corporation*, 717 F.Supp. 272, 284 (D.N.J. 1989). Again, the litigation in the products liability context that has resulted in sizable punitive awards has been directed at reprehensible conduct by manufacturers who displayed a deliberate preference for profit over public health and safety. *See, e.g., Burke v. Deere & Co.*, 780 F.Supp. 1225 (S.D.Iowa 1991) (court let stand $28 million of $50 million punitive award where evidence established combine manufacturer knew machinery was dangerous but, due to economic motivations, continued to manufacture defective machinery for over two years, and waited nearly five years to recall defective combines for retrofit with safer design, resulting in injury in 26 reported cases including the plaintiff's); and *Tetuan v. A. H. Robins Co.*, 738 P.2d 1210 (Kan.

1987) (affirming $7.5 million punitive award where evidence established plaintiff injured as a result of manufacturer's placing on market defective intrauterine device and then fraudulently concealing defects for years).

If punitive awards are limited to an arbitrary multiple of compensatory damages, plaintiffs in many cases will have no financial incentive, and indeed, will be financially unable, to seek redress for their injuries through the courts. In that event, it will be not just isolated victims, but society as a whole, which will suffer the misconduct of wrongdoers unfettered by moral or legal restraints.

CONCLUSION

The judgment of the Supreme Court of West Virginia should be affirmed.

DATE: March 3, 1993.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE,
Respondents

On Writ of Certiorari to the
Supreme Court of West Virginia

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S. AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

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No. 92-479

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE,
Respondents

On Writ of Certiorari to the
Supreme Court of West Virginia

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S. AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF CONSENT AND INTEREST OF THE AMICUS CURIAE

This brief is filed with the consent of the parties.

The Consumers Union of United States is a non-profit membership organization founded in 1936. It engages in consumer advocacy before the executive, judicial, and legislative branches of government. Consumers Union

is committed to preserving the role of punitive damages and ensuring a responsive and consumer-oriented tort system. Without such a system, Consumers Union members will be denied a legal remedy that serves to increase efficiency, deter the production of unsafe products, and provide incentives to improve insurance and other professional services.

Consumer Federation of America is a coalition of over 200 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 30 million people in matters pertaining to the well-being of the American consumer.

SUMMARY OF ARGUMENT

In a complex slander of title law suit, the petitioner was found to have participated in a fraudulent scheme, and a punitive damage award of $10 million was imposed. *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992). The jury made its judgment after receiving competent and informed instructions on the law and purposes of punitive damages. The trial court judge reviewed the jury decision and thereafter the state Supreme Court of Appeals affirmed the case. The processes used at trial, on review and on appeal, comported fully with the requirements of due process.

The complaints that the process at trial was insufficient or the review inadequate are baseless. The claim that the petitioner was entitled to greater certainty is nothing more than a wish on the part of those who might have to pay punitive damages; neither the law nor the policy in West Virginia or at a federal level requires greater certainty or additional procedures than that which was received by the petitioner.

The verdict in this case was rational, connected meaningfully to the potential profit the petitioner sought to steal. The policies underlying the verdict, expressed in the law of the state of West Virginia, protect consumers from deceitful misconduct such as that which was engaged in by the petitioner. This Court has suggested that it might undertake a review of the constitutionality of a judgment or of a scheme whereby punitive damages are imposed. Nevertheless, a willingness to review does not mean that any party against whom a judgment has been entered can suddenly convert the United States Supreme Court into a forum to review the facts or to second-guess the decision of a properly instructed jury.

The Court must reject the arguments of the petitioner and affirm the decision of the West Virginia Supreme Court of Appeals.

ARGUMENT

I

THE TORT SYSTEM IN WEST VIRGINIA PROTECTS THE INTERESTS OF CONSUMERS. THE PRESENCE OF UNCERTAINTY, THE ABSENCE OF FIXED RATIOS, AND THE USE OF WEALTH DATA DESCRIBING A DEFENDANT DO NOT CREATE AN UNFAIRNESS REQUIRING INTERVENTION BY THIS COURT.

A. The Presence of Uncertainty Furthers Legitimate State Interests

At the heart of petitioner's complaint in this case is the challenge to the $10 million punitive damage award. The petitioner contends the jury was unguided and that TXO was exposed to grave risk due to the lack of certain-

ty or fixed ratios that exist for punitive damages. This concern, while understandable from the standpoint of a profit maximizing actor, does not justify overturning the verdict, directing a new trial, or changing the rules for tort litigation in West Virginia.

Simply stated, were a business able to determine in advance its exposure to punitive damages, it would pass along the predictable cost of those damages to the consumers and thus never suffer any real financial consequence when it engaged in severe misconduct. For that reason, courts and commentators have found that "uncertainty as to the possible amount imposed is essential." Comment, *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness,* 24 St. Mary's L.J. 197, 218 (1992). "[I]t is the relatively 'indeterminate' nature of punitive damages which makes them a valuable tool in discouraging the marketing of unsafe products, because the indeterminacy of punitive damages prevents manufacturers from being 'able to predict, within certain limits, how much punitive damages will be awarded and figure such a number into a cost/benefit analysis.'" *Germanio v. Goodyear Tire & Rubber Co.,* 732 F. Supp. 1297, 1302-03 (D.N.J. 1990), *citing Man v. Raymark Indus.,* 728 F. Supp. 1461, 1467 (D. Haw. 1989).

Throughout the arguments, the *amici* claim there must be some type of proportionate relationship, some greater linkage to compensatory damages so that those subjected to punitive damages can "plan ahead." While states are free to establish a ratio using compensatory damages, there are compelling policy reasons for this Court to avoid imposing this result.

- First, such a decision would leave unpunished wealthy actors who engage in grotesque misconduct that requires dramatic sanction where there is only a nominal compensatory damage.

- Second, there are situations when compensatory awards are massive and a fixed ratio would work an injustice against the defendant.

- Third, the basic goals of punitive damages--deterrence, retribution, and punishment gauged by the nature of wrongfulness--have nothing to do with a plaintiff's injury; these critical factors are all tied into the defendant's behavior.

- Fourth, particularly for business torts, the profitability of egregious and deceitful misconduct is that which must be deterred; linking punitive damage awards to actual compensatory loss would eliminate the ability of a court to engage in such deterrence.

- Fifth, the discretion of the jury can be best exercised when it is free to raise punitive damages for a wealthy defendant or lower them for a less affluent party in carrying out the punishment and deterrent function.

- Sixth, this Court has made clear that the relationship that needed to be evaluated most closely was that which existed between the punitive damages and the defendant's conduct, not necessarily gauged by the compensatory losses the plaintiff sustained. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991).

A decision that compels the states to establish fixed ratios would have a disastrous effect on the deterrent value of punitive damages.

> Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate.

Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 St. Mary's L.J. 797, 833 (1987). Generally, courts favor an individualized punitive damage system not bound by mathematical equations.

> The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish and . . . the amount which must be awarded. . . .

Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (2d Cir. 1981).[1] Some courts have struggled to find a proper calculation mechanism[2] but have come up empty-handed:

[1]*See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1180-81 n.9 (1931) (rejecting proportional ratios as "arbitrary").

[2]*Linsley v. Bushnell*, 15 Conn. 225, 235 (1842) ("there is no rule of damages fixed by law" to accommodate punitive damages); *Commodore Corp. v. Bailey*, 393 So. 2d 467, 472 (Miss. 1981) ("The amount [of punitive damages] cannot be determined by any fixed rule.").

> Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.
>
> Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the customary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault, Inc., 202 Cal. Rptr. 204, 209 (Ct. App. 1984).

This Court has suggested that a plaintiff's entitlement to the "recovery of uncertain damages" is not flawed constitutionally, though defendants are entitled to certainty in ascertaining what conduct is wrong.[3] *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987). *Tull* follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a fine. *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286 (1911).

A directive to impose fixed multiples or other

[3]A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, *Punitive Damages: An Appeal for Deterrence*, 61 Neb. L. Rev. 651, 676 (1982).

means of ensuring certainty would frustrate legitimate and reasonable state consumer protection objectives and interfere unduly with an area of law vested clearly to the states.

B. The Admissibility of Evidence Describing the Wealth of the Defendant Furthers Legitimate State Objectives

TXO contends it is inappropriate to admit information regarding the wealth of the defendant in a punitive damage case. In *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384 (5th Cir. 1991), the court determined that a punitive damage award could be "ineffectual and impotent" if made without knowledge of corporate size or wealth. The North Dakota Supreme Court has taken the same position: "Evidence of a defendant's wealth or lack of wealth may properly be considered by the jury when fixing punitive damages because the defendant's financial condition will necessarily have a bearing on the amount that will serve as a meaningful punishment of the defendant." *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 754 (N.D. 1989).

West Virginia follows the *Eichenseer* position and deems wealth data important to allow the jury to assess damages accurately for determining punishment and deterrence. In *Slack v. Kanawha County Housing & Redevelopment Auth.*, 423 S.E.2d 547 (W. Va. 1992), the West Virginia Supreme Court of Appeals reaffirmed the virtue of permitting wealth information, though cautioned that such evidence was not absolutely necessary. *See Hess v. Marinari*, 94 S.E. 968 (W. Va. 1918).

These cases recognize that a punitive damage award, in stark contrast to compensatory damages, must focus on the economic environment in which the defendant finds itself. This task obligates a jury to see the damages as part of a much larger picture involving the desire of a defendant to acquire wealth through gross misconduct, the financial posture of the defendant, and the need to deter the defendant and others like it from engaging in similar conduct. Although the median punitive damage award is $8,800 (see *infra* Part IV), in isolated cases the amount of money required to punish a vast corporate enterprise may be substantial and potentially dissonant with the economic situation of the plaintiff.

The jury judgment in this area regarding the size of punitive damages is one of the most difficult things we ask jurors to do; it is thus counterproductive to ask them to undertake that task and then deprive them of basic information they will need to make an informed and effective decision. *See Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1277 (D.C.V.I. 1974). More than a half-century ago, Clarence Morris made clear the necessity of considering wealth in punitive damage cases on the grounds that a "penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is, the larger the punitive damage award should be." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931).

Although a state's choice to permit wealth information seems a simple matter, it is not surprising that large punitive damage awards create controversy and concern among the public and periodically the judiciary since such awards must correspond to the defendant's fiscal status, not the plaintiff's. In a punitive damage case, particularly one involving an economic tort, the defendant is often a substantial economic actor who will not be influenced and whose market counterparts will not be deterred unless the award bears a relationship to the defen-

dant's economic capacity. *See, e.g., McArthur v. Bockman*, 256 Cal. Rptr. 522, 525 (Ct. App. 1989).

The substantive due process claims in this case include the claim that the maintenance of "uncertainty" and the admissibility of wealth data caused petitioner harm and do not further a rational state purpose. In fact, there are powerful, reasonable, and clearly articulated reasons for state endorsement of these policies.

II

RESPECT FOR DECISIONS OF A PROPERLY INSTRUCTED JURY IS AT THE CORE OF OUR SYSTEM OF JUSTICE AND FUNDAMENTAL TO DUE PROCESS. JURY DETERMINATIONS MUST BE AFFORDED SUBSTANTIAL DEFERENCE.

The presupposition underlying the petitioner's claim in this case, and more broadly the claims of the *amici* is that jury decisions in the punitive damages area are suspect. This Court must resist this attack. Juries are asked to make decisions of great magnitude and complexity on matters affecting life, liberty, and property. Their decisions are the fair voice of the community. That is not to say, however, that theirs is a simple task, particularly when it comes to punitive damages; it is, however, an essential task.

A. Juries Must Make Careful But Difficult Decisions on the Nature of Wrongfu ness in Every Punitive Damage Case

Although the petitioner and the respondents disagree on much, there is little disagreement regarding the necessity of the jury considering "nature of the wrongfulness" of the defendant's misconduct in determining the

amount of punitive damages. Evaluating wrongfulness is so fundamental to the law of punitive damages that it has not been challenged in any of the cases before this Court; nevertheless, this single factor plays a greater role in the magnitude of a punitive damage award than any other.

In effect, juries are asked to use their discretion in determining the level of the defendant's reprehensibility. Juries must formulate a continuum which has at its low end "gross negligence" and at its high end "intentional and vicious misconduct." In each punitive damage case, juries are asked to rate behavior on an unseen scale and then use that rating as an aid to determining damages.

Making determinations regarding deterrence or punishment, in contrast to determinations regarding wrongfulness, is more straightforward. Given knowledge of the wealth of the defendant, a jury can determine how much money it will take to sanction. With an understanding of the profitability of misconduct, a factor of consequence to the *TXO* jury, a jury can determine what it will take to dissuade others from engaging in the same type of misconduct. In the field of law and economics, attaching a dollar value or quantifying the sum required to deter misconduct is central to much of the literature. Charles J. Goetz, *Cases and Materials on Law and Economics* (1984); Richard A. Posner, *Economic Analysis of the Law* (4th ed. 1992). Law and economics literature fails us, however, when looking at the nature of wrongfulness.

The dollar value of wrongfulness is a matter of personal judgment, moral consideration, and ethical beliefs. It is precisely because the nature of wrongfulness is so much a judgment of the individual, and a reflection of community values, that the discretion of the jury must be respected. Similarly, it is for this reason that articulating a precise calculus for determining punitive damages is

both destructive to the jury system and incompatible with the law.

> Reasonable men and women will differ in determining the amount of exemplary damages, but so long as the jury's decision is based on competent evidence, is free of passion or prejudice, and is appropriately reviewed by the trial judge, [there is] no basis for substituting this court's opinion in the place of the jury's.

Hansen v. American Nat'l Bank, No. 91-SC-375-DG, 1992 Ky. LEXIS 187, 21 (Dec. 17, 1992).

In this area of wrongfulness, juries must engage in the difficult but essential task of determining the relationship between "the degree of malice proved and the punitive damage award." *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. Ct. App. 1991). This is the respected and historical function of a state court jury and, "absent an abuse of discretion, an appellate court is not justified in interfering with the assessment." *Holcroft v. Missouri K.T.R. Co.*, 607 S.W.2d 158, 163 (Mo. Ct. App. 1980). The jury judgment in this area and specifically the judgment of the *TXO* jury, must be protected unless it appears to be "out of all proper proportion" or based on "improper motives." *Id.* at 164.

In most punitive damage cases, juries are told to look beyond "the underlying tort" and focus on the "defendant's conduct and motives." *Herman v. Sunshine Chem. Specialities, Inc.*, 608 A.2d 978, 981 (N.J. Super. Ct. App. Div. 1992); W. Page Keeton et al, *Prosser and Keeton on the Law of Torts*, §2 at 11 (5th ed. 1984). It would be perverse and inconsistent with our entire system of jurisprudence were we to suddenly determine that a jury is incapable of undertaking this task. We trust juries to guard against the misuse of power and to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 St. Mary's L.J. 797, 824 (1987). "It would be ironic indeed for the Supreme Court to hold that the jury's wisdom, so often favored when it decides to take someone's life, becomes offensive to due process when it takes someone's money." Comment, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 183 (1991). The underlying reason for empowering the jury in this area is obvious:

> [T]he jury is in the best possible position to function as the communities' conscience. A jury's reactions of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of the award, it measures societies' outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

Borowsky & Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. Rev. 147, 152-53 (1983) (footnotes omitted).

B. The Jury in This Case Received Clear and Proper Instructions Conforming with Due Process Requirements and with This Court's Decision in *Pacific Mutual Life Ins. Co. v. Haslip*

Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991), evaluated procedures in Alabama to determine whether there was "a sufficiently definite and meaningful restraint on discretion of Alabama factfinders in awarding punitive damages" while reaffirming the proposition that punitive damage jurisprudence is grounded in state tort law. *Silkwood v. Kerr McGee Corp.,* 464 U.S. 238, 255 (1984). *Haslip* cautioned states to ensure that juries are given meaningful instructions and that post-trial and appellate review occur. *Haslip* did not, however, direct the states to articulate new standards.

There are situations where critical constitutional interests are at stake, and states are directed to articulate guidelines to protect the fundamental interests of the citizenry. For example, after *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), this Court directed the states to articulate standards in defamation cases involving private persons and media defendants with the liability standard ranging between negligence and malice, eliminating strict liability. Nowhere in the *Haslip* opinion is there a directive to the states to articulate precise standards in the punitive damage area, nor can the language of *Haslip* be read as obligating state courts to move in a "new direction" regarding punitive damages. *Hoff v. Bauer,* 492 N.W.2d 912, 914 (S.D. 1992).

The constitutional review undertaken in *Haslip* inquired whether there are objective criteria guiding a jury, a fair process by which a jury decision can be reassessed at the trial court level, and an appellate review based on

meaningful criteria in terms of the goals of punitive damages. *Haslip* requires that such damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. . . ." 111 S. Ct. at 1045. The process used in the state of West Virginia in determining the liability of the TXO Production Corporation conformed fully with these requirements, and the damages, reflecting an amount less than the profit potential of the petitioner, were rational in light of their purpose.

The instructions given to the jury in *TXO* are standard, thorough punitive damage instructions substantially similar to those in *Haslip*. Instruction No. 6A instructed the jury on the culpability and the amount of damages. As to culpability, the jury had to find behavior that was "wanton, willful, malicious or reckless conduct which shows an indifference to the right of others. . . ." Joint Appendix at 34. As to the critical question of amounts, the jury was told to

> take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages. The object of such punishment is to deter TXO Production Corp. and others from committing like offenses in the future. Therefore, the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

Joint Appendix at 34-35.

As in *Haslip*, an option was provided whether to award punitive damages, the goals of punishment and deterrence were clearly articulated, and the jury was directed to engage in the difficult task of assessing the nature of the wrongfulness of the defendant's behavior.

The second fundamental requirement of *Haslip* was a post-trial review. An oral argument on September 20, 1990, before the trial court judge permitted argument for both sides on post-trial motions, including a request for a remittitur. At the conclusion of that proceeding, the trial court judge acted on the motions and denied the request for remittitur, concluding an adequate post-trial review. Petitioner's Appendix in the Petition for Certiorari at 55A-74A.

The final obligatory proceeding, based on *Haslip*, was the appellate review in the Supreme Court of Appeals of West Virginia. The court determined the defendant had engaged in "intentionally committed, mean spirited, and harmful acts." *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 889 (W. Va. 1992). It found the behavior of TXO was fraudulent, intentional, and capable of causing "millions of dollars in damages to other victims." *Id.* The court found the award of $10 million was "necessary to discourage TXO from continuing its pattern and practice of fraud, trickery, and deceit." *Id.* at 889-90.

Petitioner and its *amici* attack the *TXO* opinion because, in addition to the above review, the court chose to create a rather awkward dichotomy between "really mean" and "really stupid" acts of misconduct. While lawyers and law professors might choose to make light of the

grammatical or linguistic frailties of this section of the opinion, faulty grammar or poor word choice do not render this opinion flawed, nor this process unconstitutional. Given the necessity of demystifying legal jargon and rediscovering "plain English," particularly in jury instructions, one should not be so quick to condemn recommending understandable terms like "mean" (conveying intention) and "stupid" (conveying gross negligence). The phrases used by the trial court judge or the language used in the court of appeals could have been articulated with greater clarity. The Due Process Clause, however, does not mandate rhetorical perfection, but rather notice and an opportunity to be heard.

C. The *TXO* Jury Benefited From Clear Instructions and Did Not Function in a "Vague and Standardless" Setting

The petitioner contends the instructions in this case were vague and thus constitutionally deficient. Since the instructions to the jury in this case were substantially similar and even more confining than those in *Haslip,* and since there was adequate post-trial and appellate review, it is hard to say that there is a systemic flaw in West Virginia procedure. On the question of vagueness, the petitioner has followed up on the "void for vagueness" concerns raised in the dissenting opinion in the *Haslip* case.

As a general rule, the constitutional prohibition on vagueness is utilized "for curbing legislative invasion of constitutional rights other than that of fair notice," not for second-guessing jury instructions. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 87-88 (1960). Although vagueness concerns have been raised in punitive damage cases, there is little basis for the applicability of the doctrine beyond civil or

criminal statutory analysis. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1535-36 (D. Minn. 1989). The vagueness concerns in this field relate to communicating with potential defendants that which is prohibited so that behavior can conform with the law in a particular state. Accordingly, most challenges to the damage calculation mission, historically vested to the discretion of a well instructed jury, have not gone forward under the statutory tests that are inherent in a "void for vagueness" dialogue. *Coyne v. Allstate Ins.*, 771 F. Supp. 673, 679 (E.D. Pa. 1991); *cf. Williams Pipeline v. City of Mounds View*, 704 F. Supp. 914, 921 (D. Minn. 1989).[4]

The trial judge in the present case gave instructions on punishment, deterrence, and wrongfulness, enunciated the purpose of punitive damages, and explained the level of culpability needed. Nothing more is needed. The standards are clear, and the jury was properly instructed. To contend that this is a "standardless" process flawed by vagueness or that the judge failed to communicate state law is to deny fact.

[4]West Virginia punitive damage law is substantially similar to that of Hawaii. A constitutional challenge there was resolved thusly: "[T]he standard established by Hawaii law is sufficient to apprise potential defendants and juries of both the nature of the conduct which may expose one to punitive damage liability as well as what level of award is appropriate under the circumstances." *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465 (D. Haw. 1989).

III

WEST VIRGINIA PUNITIVE DAMAGE LAW COMPORTS WITH DUE PROCESS.

A. The History of Substantive Due Process Mandates Restraint in Assessing State Law Programs or Jury Verdicts

Probing substantive due process review is reserved for constitutional assessments of fundamental entitlements. A system that allows punitive damage awards affecting property interests need satisfy only the rational basis test.[5]

In situations involving interests of an entirely different character than those involved in this case, an expansive review is mandated. Intrusive review may be needed when assessing "statutes directed at particular religious, or national, or racial minorities . . . [or laws] which . . . seriously . . . curtail the operation of those political

[5]*Lochner v. New York*, 198 U.S. 45 (1905), one of the "most ill-starred decisions that [the Court] ever rendered," declared unconstitutional a New York workplace safety law. William H. Rehnquist, *The Supreme Court--How It Was, How It Is* 205 (1987). The Court balanced public safety and freedom of contract and, coming to a result opposite that of New York lawmakers, used substantive due process to assert their will. For the next thirty years the Court used substantive due process "to strike down state laws, regulatory of business and industrial conditions, because they . . . [were thought to] be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). *Lochner* "wisdom substitution" subsided with *Nebbia v. New York*, which held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare." 291 U.S. 502, 537 (1934). To expand *Lochner* substantive intrusion to review of the size of a jury verdict is a true reversion to a negative past.

processes ordinarily to be relied upon to protect minorities. . . ." *United States v. Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938) (citations omitted). These cases employ a careful review of the purpose and precision (or vagueness) of state law on fundamental constitutional entitlements or interests, none of which bear the slightest resemblance to the interests asserted by petitioner in this case.[6]

The negative consequences of an overexpansive view of substantive due process illuminate two canons of constitutional interpretation. Rehnquist, *The Supreme Court,* at 144. The first requires restraint in the use of the Constitution to resolve a matter addressed appropriately by other standards. *Id.* West Virginia has addressed the matter of punitive damages through recent judicial action, as have numerous states. The second holds that a mere sense of unfairness is not a basis to declare a law unconstitutional. "[A] sense that a law is unfair, however deeply felt, ought not to be itself a ground for declaring an act of Congress void." *Id.* at 145.

> Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at

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[6]*See, e.g., Roe v. Wade,* 410 U.S. 113 (1973) (involving abortion); *Boddie v. Connecticut,* 401 U.S. 371 (1971), and *Loving v. Virginia,* 388 U.S. 1 (1967) (involving freedom of choice in marital decisions); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (involving marital privacy); *Carey v. Population Services Int'l,* 431 U.S. 678 (1977) (purchase of contraceptives); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), and *Meyer v. Nebraska,* 262 U.S. 390 (1923) (involving child rearing).

> fashioning a solution.

Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693, 700 (1976).

The request for a substantive due process review of West Virginia law on the premise that this verdict is "wrong" is not based on any solid constitutional ground. Since the state law and the processes that implement the law support multiple legitimate state interests, the requirements of due process are satisfied.[7] Even if the constitutional challenge was based on "vagueness" and one were to assume that there were constitutionally suspect vagaries in the state, *Garnes v. Fleming Landfill, Inc.,* 413 S.E.2d 897 (W. Va. 1991), resolves any question of the specificity of the law of West Virginia for the future.[8]

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[7]Protecting consumers through the implementation of a vigorous punitive damage system that maintains a balance between punishment and deterrence and that requires the sum awarded to match the level of reprehensibility of the defendant constitutes a clear, reasonable state objective.

[8]Initially, the petitioners contended that the court's failure to apply retroactively the punitive damage language articulated in *Garnes* required that the verdict be set aside. Although this Court has recently considered the matter of retroactive application of standards, *see, e.g., James B. Beam Distilling Co. v. Georgia,* 111 S. Ct. 2439 (1991), the question of whether a state is obligated to apply retroactively procedural refinements hardly seems controversial. Retroactive application of decisions such as one affecting a linguistic elaboration of recommended jury instructions or review standards is so soundly vested to the discretion of the state as to be beyond question. *Great Northern Ry. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932). Since *Garnes* neither raised a new principle of law nor overruled past precedent on which the parties may have relied, its nonapplicability did not flaw the *TXO* opinion. *See Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971); *but see American Trucking Assn. v. Smith,* 496 U.S. 167 (1990), and for West Virginia *see Devmja v. West Virginia Bd. of Medicine,* 408

By virtue of *Garnes*, West Virginia has moved far beyond the norm in terms of clarifying the standards for punitive damages. Accordingly, there is no need for this Court to embark on the extremely controversial task of rewriting state jury instructions or standards for trial court or appellate review; this task has already occurred in the proper forum. Since *Garnes* is the law of the state for punitive damage trials to be held in the future, this Court is left with the singular task of deciding whether its judgment regarding the size of the verdict in the *TXO* case would be different than the judgment of the jury that sat in the *TXO* case. Such second-guessing of state court juries on purely factual questions hardly seems appropriate.

B. West Virginia Trial Process Comports with Procedural Due Process

A true failure of process is a most serious constitutional matter. Were the petitioner denied notice of a legal standard, the possibility of sanctions, or were there a denial of an opportunity to be heard, this Court would be obligated to act. No such facts exist to support those contentions. This case does not involve a denial of an opportunity to be heard or notice, but rather a disagreement over the wisdom of substantive choices made by state law and by a jury. Such is hardly an appropriate matter for a due process review.

Deciding what processes are due requires a balancing of interests articulated in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). *Mathews* established a three-part test for balancing various interests when the state action affects life, liberty, or property requiring an assessment of

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S.E.2d 346 (W. Va. 1991); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

the private interests and government interests affected, as well as the risk of error in the process.

Petitioner claims that it was entitled to "better" jury instructions, including limits on liability, to more oral clarity from the judge who gave the jury instructions, to a more artful state Supreme Court of Appeals decision, and to a "better" set of laws regarding punitive damages. These matters may be of great consequence, but they are not part of a procedural due process analysis. They are substantive law issues vested to the best judgment of the state of West Virginia. A North Dakota court assessed similar claims as follows:

> Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty, or property. This procedural aspect of the due process clause does not protect against the use of arbitrary rules of law which are the basis of those proceedings.

Puppe v. A.C. and S., Inc., 733 F. Supp. 1355, 1360 (D.N.D. 1990) (footnotes omitted).

As previously noted, the methodology for determining process entitlements requires an assessment of petitioner's private interests, in this case money. Specifically, petitioner would like greater certainty and predictability regarding the potential of a large punitive damage award. Such information would allow petitioner to modify its pricing of goods and services and ensure against the "sting" of a punitive damage award. As already demonstrated, a component of uncertainty forwards the rational state interest in the punishment function of punitive damages and does not compel a constitutional inquiry.

Petitioner's interest in certainty regarding disposition of its property runs in tandem with the allegation that the West Virginia jury system presents a dangerously high risk of erroneous decisionmaking, the second leg of the *Mathews* test. The interest claimed here is equally vacant. The jury heard all of the evidence at trial, including the petitioner's defenses. They were instructed that they did not have to award punitive damages, but if they did, the amount should reflect what is necessary to punish and deter, taking into account the wrongfulness of the conduct. The foregoing process is constitutionally sufficient.

The final leg of a *Mathews* analysis requires an assessment of the governmental interest in the challenged process. In this case a procedural due process attack has been levied against the use of a jury. The state has a significant interest in maintaining a punitive damage system that allows juries to express the will of the state to punish intentional wrongdoers and deter future destructive behavior. These are powerful interests in comparison with the private interest of the defendant. In light of these interests, it is hard to conceive of a reasoned analysis that would compel this Court to rewrite the laws of West Virginia based on a failure of procedural due process.

IV

THERE IS NO TORT CRISIS JUSTIFYING INTERVENTION BY THE SUPREME COURT.

During the last ten years the tort system--and particularly the various systems for determining punitive damages--has come under close scrutiny. In the present case, this Court has agreed to consider whether the system for determining a $10 million punitive damage award in West Virginia comports with the constitutional requirement of due process. It appears a motivation to consider this matter comes from a concern that punitive damages nationally are "out of control," depriving parties of fundamental fairness. *Pacific Mutual Life Ins. Co. v. Haslip,* 111 S. Ct. 1032, 1039 (1991), *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part), and *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 87-88 (1989) (O'Connor, J., concurring).

A recent comprehensive study funded by the American Bar Foundation concludes that there is no punitive damage crisis based on a careful evaluation of 25,000 jury verdicts and related statistics. Daniels & Martin, *Myth and Reality in Punitive Damages,* 75 Minn. L. Rev. 1 (1990), and Daniels & Martin, *Myth and Reality in Punitive Damages,* ABF Working Paper No. 8911 Am. B. Found. Res. J. 63 (1990) ["ABF Study"]. Although the *amici* in this case assert to the contrary, there is no clear and unequivocal data suggesting a national crisis sufficient to compel intrusive judicial intervention, stretching the limits of the due process clause, to address a problem that may well not exist.[9]

Critics of punitive damage awards distort statistical images through the use of numerical averages. For exam ple, in a RAND study, the average award was $137,350, but 87.7 percent of the cases had awards lower than the average, with a median of $8,800. Peterson, *Punitive Dam-*

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[9]A diverse group of scholars have written that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, *New Light on Punitive Damages,* 10 Reg. 33 (Sept./Oct. 1986); Burrow & Collins, *Insurance Crisis–Texas Style: The Case for Insurance Reform,* 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform,* 18 St. Mary's L.J. 673, 695 (1987).

ages: Preliminary Findings (RAND Institute for Civil Justice 1985). The fact is that "[t]he predicted unmanageability of punitive damages has failed to materialize. Experience has shown that judicial oversight of punitive damages awards has greatly reduced the risk of substantial over-deterrence." Reisberg, *In Defense of Punitive Damages*, 55 N.Y.U. L. Rev. 303, 345 (1980). There are three juried empirical and systematic studies of punitive damages, and none support the proposition that there is a national crisis in punitive damages.[10] This Court must avoid scrupulously the mischaracterizations that have been put forward regarding the state of punitive damages:

> Horror stories and their implications are presented as if they are representative of what is typical, describing a system run amuck and in need of fundamental and immediate change. Such vivid stories typically distort the actual facts of situations described. . . . The stories are meant to foster the acceptance of a particular characterization of the civil justice system and punitive damages. . . . The view is portrayal as one so obvious and common-sensical that no reasonable person could disagree. . . .

ABF Study at 22. In the absence of unequivocal data suggesting a crisis in the punitive damage area, judicial intervention into an area vested historically to the states is unwarranted.

[10]Rustad, *Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter-Century of Trial Verdicts*, 1991 Roscoe Pound Foundation, Research Monograph; the ABF Study; and Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings* (RAND Institute for Civil Justice 1987); Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 Rev. Litig. 113, 123 (1988) ("The attack on punitive damages is part of a wide-ranging, well organized attack on the current tort system. . . . There is substantial evidence that the claims of runaway punitive damages are greatly exaggerated.").

In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated. Constitutionality of punitive damages was considered in *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law."

Punitive damages are vital to the protection of consumers. With the minimum of transaction costs, they achieve the dual goals of punishment and industrywide deterrence of future misconduct and creation of incentives to upgrade the quality of goods and services.

In the state of New York, the deterrence function of punitive damages is well recognized:

> A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961).

Finally, it has been contended that punitive damages have an adverse effect on the competitive posture of the United States. *Browning-Ferris,* 492 U.S. at 282 (O'Connor, J., dissenting). Quite simply, there is no empirical basis to support the proposition.

It seems incredulous to assert that a system that condemns products or services produced fraudulently, in a grossly negligent manner, or in a way that comports with intentional misconduct is destructive of the competitive posture of the United States. In *Man v. Raymark Indus.,* 728 F. Supp. 1461 (D. Haw. 1989), the court considered whether punitive damages have a detrimental effect and prevent manufacturers from developing new products due to their fear of "uncertain liability."

> This court respectfully suggests that if that is indeed what is happening [to proposed new products], then punitive damages are accomplishing a worthy goal. In this respect it is important to remember that punitive damages are awarded for some form of outrageous misconduct, never for simple negligence. A manufacturer who vigilantly and honestly tests his product can have no fear of punitive damages.

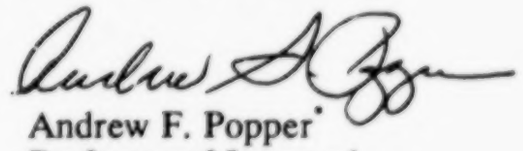
728 F. Supp. at 1467 n.7.

CONCLUSION

The state of West Virginia has complied with constitutional, common law, and statutory requirements in the *TXO* case. In so doing, it expressed policy that permits

punitive damages for reasons that are obvious: such damages forward efficiently the interests of the citizens of the state, punishing those who flout the law and discouraging those who might try. To interfere with the state through this forum is wrong. The decision of the state in *TXO* should be affirmed.

Respectfully submitted,



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Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND CO., GEORGE KING, AND GROVER C. GOODE,
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Appeals of West Virginia

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BRIEF OF AMICUS CURIAE UNIVERSITY SCHOLARS AND LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The amici are legal scholars who have researched or published on the subject of punitive damages, professors of law who are expert in the fields of torts, products liability, or constitutional law, and other university scholars who have read and written on the interplay of law and such diverse disciplines as economics and sociology.

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As both scholars and citizens, we have a keen interest in ensuring that decisions by this Court are rendered on the basis of the best information available. We likewise have an obligation to present to the Court whatever wisdom and understanding we have gained over the years in researching subjects that have bearing on the issues in this case.

None of the amici have an interest in either the outcome of this case or the outcome of any punitive damages case. Amici seek to advise the Court about the results of their research in the hope that it will correct some popular misconceptions about the functioning of the punitive damages remedy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petitioner and its amici assert diverse and unsubstantiated claims that awards of punitive damages are too numerous, too large, and growing fast in both number and size. They maintain that a rising tide of punitive damage awards not only threatens their individual corporate interests but also jeopardizes our country's overall economic health and its competitive standing in world markets.

The Petitioner and its amici specifically assert that "[p]unitive damage awards, particularly in the business context, are

increasing by leaps and bounds," Brief of the Equal Employment Advisory Council ("EEAC Brief"), at 13; that punitive damages awards are increasing "exponentially," Brief of Arthur Anderson & Co., et al ("Big Six Brief"), at 2; that these awards are not only "massive" but "discriminatory," Brief of the Products Liability Advisory Council ("PLAC Brief"), at 1-2; that the calamity of punitive damages "running wild" has not abated since this Court's decision in Pacific Mutual Insurance Co. v. Haslip, 111 S.Ct. 1032 (1991), Brief by the American Tort Reform Association ("ATRA Brief"), at 4-5; that increasingly numerous and increasingly large awards of punitive damages "have deterred socially beneficial behavior and led to grotesque misallocation of resources," ATRA Brief at 6 (citations omitted); that jurors are prejudiced against corporate defendants, PLAC Brief at 2, 15[1];

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[1] It is odd that jurors are still tarred with the brush of being biased towards plaintiffs in view of the fact that every available empirical survey reveals that jurors are far more pro-defendant than they are pro-plaintiff. Nowadays, "[r]ather than revealing jurors willing and eager to impose on business the costs of plaintiffs' injuries, our findings show that jurors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. [Moreover,] [d]espite insistence on product safety and high expectations of business, jurors were [a] generally favorable toward business, [b] skeptical more about the profit motives of individual plaintiffs than of business defendants, [c] committed to holding down awards." Valerie P. Hans and William F. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, (University of Delaware, May, 1992), at 11; (to be published in a forthcoming issue of Law and Society Review). Generally, "tort jurors had strong negative views about the frequency and legitimacy of civil lawsuits." Id. Specifically: "83% of the tort jurors sampled either agreed or strongly agreed with the statement that '[t]here are far too many frivolous lawsuits,'" id. at 41, Table 1; "81% agreed or strongly agreed with the proposition that '[p]eople are too quick to sue . . . ,'" id.; "39% agreed or strongly agreed with the assertion that '[t]he money awards that juries are awarding in civil cases are too large,'" id.; "32% agreed or strongly agreed that "[t]he number or lawsuits show that our society is breaking down.'" Id. On the other hand, "[c]ontrary to the skepticism shown plaintiffs, corporate defendants were typically not subjected to such vigorous scrutiny," id., Profs. Hans and Lofquist "found little evidence of tough standards and punitiveness [by jurors] toward[s] . . . corporation[s] . . . ," id., at 18; learned that most jurors evinced

only "scattered concern about the profit motive causing business to cut corners," id. at 23; discovered that most jurors polled thought that an "organization's assets should not be and were not relevant to the liability and award decisions," id. at 26; and found that jurors' "comments derogating business were rare compared to the more frequent negative evaluations of the plaintiffs and their [putatively] mercenary motives." Id. at 24. The numbers bear out their conclusions: 57% of the tort jurors sampled either agreed or strongly agreed with the statement that "[t]he threat of lawsuits is so prevalent today that it interferes with the development of new and useful products; 51% agreed or strongly agreed with the view that "[b]ig business . . . is adequately concerned with the safety of its workers"; and 32% agreed or strongly agreed with the notion that "[t]he courts have meddled so much in the workplace that many businesses are not able to remain competitive."
Id. 42- 43 – Table 2: Tort Jurors' Attitudes Toward Business Regulation and Litigation.

The survey results published by Profs. Hans and Lofquist are consistent with those reported earlier this year by the Roper Organization, Inc. According to the Roper poll:

> [**Seventy percent** of the persons surveyed agreed that:] a major effects of liability suits is to give lawyers "much more money than they deserve." **Sixty-three percent** agreed that "people often start frivolous lawsuits because awards are so big and they have so little to lose." . . . Only [**40%** of the] people queried . . . said a significant result of liability suits is the fair compensation of victims. . . . Almost [70% of those surveyed] would limit punitive awards, and a majority wanted to cap awards for lost wages and pain and suffering.

Quayle's View on Liability Suits Is Widely Held, Poll Shows, Wall St. Jnl., Feb. 19, 1992, at B10. (Emphasis added). See also Kevin M. Clermont, and Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Corn. L. Rev. 1124 (1992) (revealing that judges are more pro-plaintiff than jurors; in personal injury cases, plaintiffs won 50% of all bench trials, while winning in only 29% of the cases tried to a jury); Sean F. Mooney, Crisis and Recovery: A Review of Business Liability Insurance in the 1980s, Insurance Information Institute, May 1992, at 19 ("A 1992 survey shows that 44 percent of public believes only about half of the plaintiffs in [civil liability] suits have just cause to file suit."); Edith Greene, Jane Goodman, and Elizabeth F. Loftus, Jurors' Attitudes About Civil Litigation and the Size of Damage Awards, 40 Am. U. L. Rev. 805, 805 (1991) (90% of jurors polled "agreed that there are too many

that judges are either unwilling or unable, to "stem . . . the massive increase in punitive damages verdicts," id., at 1-2; and state legislatures have likewise been incapable of providing a "uniformly effective answer to the problem of excessive punishments." ATRA Brief at 29.

The Petitioner and its amici fail to substantiate these claims by systematic, empirical examination of the patterns of punitive damage awards. Moreover, they fail to provide this Court with an objective review of the five separate detailed, consistent, and uncontroverted empirical studies that have been published in the last six years by federal government researchers, independent foundations and think tanks, and university scholars. Finally, they rely, mistakenly, on an ostensibly objective study written by lawyers for a company that was assessed the largest punitive damages award in history.

The largely rhetorical arguments of the Petitioner and its amici should not tempt the Court into trenching upon the historically sovereign provinces of the states. As our review will show, there is simply no compelling reason for the Court to turn back the clock to the Lochner v. New York, 198 U.S. 45 (1905), era by abandoning the modest "rational relationship" that the Court has used for decades in evaluating whether a state law violates the Fourteenth Amendment's due process clause.

lawsuits." Id. at 814); Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest? 18 St. Mary's L.J. 797, 824-25 (1987).

ARGUMENT

I. THE COURT'S DECISION IN THIS CASE SHOULD BE GUIDED BY EMPIRICAL RESEARCH, NOT UNSUBSTANTIATED CLAIMS

The Petitioner and its amici demand that this Court radically restructure the remedy of punitive damages, a remedy whose use predates the Founding of the Republic and a remedy that has long been honored as a traditional province of the substantive tort law of the states. This demand is premised on unproven claims that punitive damages have not only been "running wild" but are now so untethered to reason that they are beyond the effective power of state courts and state legislatures to bring them under control, to reign in excessive awards, and to provide jurors with meaningful guidance or sufficient constraints.

Before this Court limits the states' long-standing freedom to tailor their substantive, procedural, and evidentiary standards regarding punitive damages to their own assessments of what is necessary and proper to achieve legitimate state goals, we respectfully submit the Petitioner and its amici have the burden of producing empirical evidence sufficient to prove widespread misuse of the remedy of punitive damages. We further submit that the Petitioner and its amici have failed to meet their burden. Moreover, insofar as the claims made by the Petitioner and its amici are not only lacking in factual and empirical support but actually run counter to the consonant and uncontroverted studies regarding punitive damages that have been undertaken in recent years by university, government, and independent researchers, the Petitioner and its amici cannot satisfy their burden.

As discussed below, in contrast to both popular conception and the sundry and unsubstantiated claims of the Petitioner and its amici, each one of the five empirical studies concerning punitive damages that have been published in the last six years convincingly establishes that punitive damages are rarely awarded and, because

of judicial and non-judicial controls present at every stage of the litigation process, are even more rarely collected.

Without solidly grounded empirical data -- well-established research findings, not merely popular myths -- about the frequency, size, and severity of punitive damages, this Court may be misled into believing that radical surgery is required.[2] We submit that any decision not solidly grounded on a foundation of objective, empirical data -- hard truths, not cardboard myths -- about punitive damages is liable to lead to mischief. For example, without information on typical sizes of punitive damage awards, it is impossible for this or any other court to determine whether a given award is "excessive" or "disproportionate." Thus, as American Bar Foundation researchers Stephen Daniels and Joanne Martin have emphasized:

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[2] Of course, just as the debate over punitive damages is not new, neither is the recognition that empirical research is critically important in guiding that debate. Thus, more than 60 years ago, Harvard Law Professor Clarence Morris urged courts, legislators, and scholars to devote at least as much attention to laboriously mined and demonstrable facts as to carefully reasoned theories and artfully crafted proposals. See Clarence Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev., 1173, 1179 (1931). As the authors of one of the empirical studies discussed below lament, however, Morris' exhortation has been honored more in the breach than in the observance. Stephen Daniels and Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 4 (1990). Thus, Daniels and Martin note that modern-day proposals for punitive damages reform are premised on four supposedly factual propositions – "punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards have been rapidly increased; and these phenomena are national in scope," id. (footnote omitted) – that "are based on scanty empirical data and highly questionable interpretations of those data." Id. (footnote omitted; emphasis added). Indeed, Daniels and Martin observe that proponents of punitive damages reform rely as much upon "horror stories and anecdotes about jury verdicts involving punitive damages" as they do upon "aggregate data on the frequency and size of such awards. Id. at 14. See also id. 15-27 concerning the "punitive damages reformers'" use of public relations techniques and scare tactics to "market" proposals for punitive damages reforms and the reformers' tendentious use of previously-published empirical data.

> Our understanding of the civil justice system, and eventually our ability to devise theoretical statements to explain its behavior, is dependent on the development of a body of sound descriptive studies. Without such building blocks, our understanding of civil justice will not progress beyond the unsubstantiated generalizations that dominate the policy debate.[3]

Fortunately, however, during the last six years, five empirically-based studies of punitive damages awards been published, studies that differ from each other in many respects -- in their authors, in the length of the periods studied, and in the geographical areas surveyed -- in fact, in almost every respect but one: their results. On the issues that are critical to this Court's proper disposition of this case, i.e. whether punitive damages are rapidly increasing in number and size and whether they are "disproportionate" in size to awards of compensatory damages, all five studies reach remarkably consistent conclusions, to wit, in the words of Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit and University of Chicago Law Professor William M. Landes, punitive damages present "relatively insignifican[t]" problems. William M. Landes and Richard A. Posner, The Economic Structure of Tort Law (1987), at 304.

As discussed in detail below, each empirical study has reported that, contrary to widespread myths, punitive damages are not numerous, are not rising "explosively," are not "way out proportion" to the awards of compensatory damages, and are not "wild[ly]" increasing in the size of the awards. Finally, although each of the five studies are consistent with each other, at least regarding their ultimate findings that awards of punitive damages are not numerous, are not grossly disproportionate to the

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[3] Stephen Daniels and Joanne Martin, "Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards," American Bar Foundation Working Paper No. 8705 (1988), at 1 (emphasis added).

compensatory damages awarded in the same case, and are not increasing rapidly in either number or size, these studies and these findings are in contradiction with an empirical study prepared by inside and outside counsel for Texaco. For the reasons discussed below, Texaco's exposition of its data and the methodology employed by Texaco in analyzing its data are uninformative and somewhat illusive.

II. THE UNANIMOUS FINDINGS OF EACH OF THE FIVE EMPIRICAL STUDIES OF PUNITIVE DAMAGES UNDERTAKEN IN THE LAST SIX YEARS ESTABLISHES THAT PUNITIVE DAMAGES ARE NOT A REMEDY IN NEED OF REFORM, LET ALONE THE RADICAL REFORM PROPOSED BY THE PETITIONER AND ITS AMICI

A recent review of the research on punitive damages concludes that, "every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support," the claim that "punitive damages have grown dramatically in both frequency and size." Michael Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--and Why Not?, 140 U. Pa. L. Rev. 1147, 1254 (1992). The five comprehensive studies of the size and frequency of punitive damages referenced by Professor Saks are discussed in chronological order below.

1) LANDES AND POSNER STUDY (1987) -- As the Court well knows, punitive damages have been the subject of controversy for at least a decade. "Because so much concern ha[d] been expressed about runaway juries imposing colossal punitive damage awards in products liability cases," Judge Richard

M. Posner and University of Chicago Law Professor William M. Landes "attempted to estimate the quantitative importance of such awards by examining all reported products liability cases in the federal courts of appeals from the beginning of 1982 through November 1984."[4] William M. Landes and Richard A. Posner, The Economic Structure of Tort Law (1987), at 302.

Their research led them to conclude that punitive damages were "relatively insignifican[t] . . . ." Id., at 304.

> Of the 172 cases in the sample, punitive damages were upheld on appeal in only four instances, which is fewer than 3 percent of the cases and fewer than 5 percent of the cases that plaintiffs won. [The data revealed] also that punitive damages are more likely to be reversed than are other outcomes. For example, six of ten punitive damage awards were reversed and one more was reduced by two-thirds. In comparison, fewer than one-third of the decisions in favor of plaintiffs but not awarding punitive damages were reversed.

Id. (emphasis added).

Judge Posner and Professor Landes subsequently enlarged their sample, but the addition of more data further validated rather than undercut their initial findings. Accordingly, they concluded that:

> [t]he insignificance of punitive damages in our samples is evidence that they are **not being routinely awarded**. Out of a total of 359 cases in all of our samples, punitive damages were allowed in only seven -- 2 percent.

Id., at 305-06 (emphasis added). Finally, Judge Posner and Professor Landes observed that [t]he average award of punitive damages in those seven cases was less than $500,000, slightly more than the average actual damages awarded in those cases." Id., at 306 (emphasis added).

2) THE RAND CORPORATION – INSTITUTE FOR CIVIL JUSTICE ("RAND-ICJ") STUDY (1987) – Like Judge Posner and Professor Posner, the RAND Corporation's Institute for Civil Justice observed that "[t]he award of punitive damages is among the most controversial issues currently under debate by those concerned with the civil justice system." Gustave H. Shubert, [RAND-ICJ Director], Forward to Mark Peterson, Syam Sharma, and Michael Shanley, Punitive Damages: Empirical Findings, RAND Report, R-3311-ICJ (1987), at i. Similarly, the RAND-ICJ study noted that "as with many other civil justice issues, the debate [concerning punitive damages] has proceeded without much attention to facts." Id. Thus, "despite the attention they have received, there has been little

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[4] Posner and Landes took pains to

> note that the sample itself is likely to be unrepresentative of the universe of products liability cases -- but unrepresentative in a direction that tends to bias our estimate against the hypothesis we test, and reject: that punitive damages are being overused in modern products liability law.

William M. Landes and Richard A. Posner, The Economic Structure of Tort Law (1987), at 302 (emphasis added). Thus, they explained that

> [t]he economic theory of litigation predicts that cases most likely to be litigated and appealed will be those where the law is most uncertain and where damages largest. This suggests that our sample will overstate the relative importance of punitive damages in products liability cases; an award of punitive damages will increase the probability of an appeal. Of course, if parties are highly risk averse, this would tend to raise the settlement rate in cases where punitive damages are likely to be awarded if the case is tried. But we have offered reasons for doubting the importance of risk aversion in the products liability area.

Id., at 302-03 (footnote omitted; emphasis added).

empirical analysis of their number, their size, or the conditions under which they occur." Id., at v. Like Judge Posner and Professor Landes, the RAND-ICJ researchers set out to change that state of affairs, examining all civil jury trials in San Francisco County, California and Cook County (Chicago), Illinois from 1960 to 1984 and all civil jury trials in the state of California from 1980 to 1984. Id.

As Judge Posner and Professor Landes noted in their book, the results of the RAND-ICJ study were consistent with the results of their own research. Landes and Posner, supra, at 306. Thus, the RAND-ICJ:

> analyses show that the incidence of punitive damages has been quite small throughout the 25-year period in Cook County (on average, less than three such awards per year) and in San Francisco County (one per year). The pattern is similar in the rest of California from 1980 to 1984. Product liability cases have been of special concern to many critics, but our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984.

Peterson, Sharma, and Shanley, supra, at v (emphasis added). Or, as Judge Posner and Professor Landes summarized the RAND-ICJ data, during the twenty-five year period studied: "only eight-tenths of 1 percent of all jury trials in San Francisco in products liability cases resulted in . . . an award [of punitive damages]; the corresponding figure for Cook County was only one-tenth of 1 percent." Landes and Posner, at 306-07.[5]

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[5] Along the same lines, the RAND-ICJ analysts noted that

> [i]n the 1980's in Cook County the number of punitive damage awards for personal injury cases barely increased, but the amount of money awarded rose sharply. After having awarded only $1.6 million (in 1984 dollars) during the previous twenty years, Cook County juries awarded $27 million during the early 1980's. Most of the dollars were awarded in three cases with exceptionally large awards.

Id. at v-vi (footnote omitted; emphasis added). Similarly,

> [i]n San Francisco [County], the total amount of money awarded in punitive damages increased sharply in the late 1970's; between 1980 and 1984 the same amount was awarded as in the immediately preceding period, although the total number of personal injury trials dropped sharply.

Id., at vi.

As the RAND-ICJ summarized its research: "punitive damages were rarely awarded in personal injury litigation and when awarded were usually small. But the largest awards have increased in recent years." RAND-ICJ Study at vi (emphasis added).

3) GAO STUDY (1989) -- The U.S. Government Accounting Office ("GAO") analyzed the frequency and size of punitive damage awards by collecting and reviewing court records in all (305) products liability cases resolved through trial between 1983 and 1985 in five representative states -- Arizona, Massachusetts, Missouri, North Dakota and South Carolina. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolutions in Five States, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, House of Representatives, GAO/HRD-89-99 (Sept. 1989) ("GAO Study"), at 2.

The GAO made the same basic findings and reached the same basic conclusions as did Judge Posner and Professor Landes and the RAND-ICJ researchers, viz.: that punitive damages were awarded infrequently (in only 23 of 305 cases -- 7.5%) and "were

highly correlated (.71) [in size] with the compensatory damages [awarded]." Id., at 3. For example:

> [t]he 23 punitive damage awards had an average just under $1.3 million and a median of $400,000, which are only slightly larger than the average and median compensatory awards in those 23 cases (average of $906,000 and median of $375,000.)

Id., at 29.

Furthermore, the GAO found that post-trial appeals and settlements substantially reduced the size of punitive damage awards. Thus, for example:

> Appellate courts reversed or remanded for trial all punitive damages awards on which they ruled. The courts ruled on 12 punitive damages awards: 9 were reversed and 3 were vacated and remanded for retrial. For only 1 of 9 awards that were reversed, the compensatory damages was also reversed.

Id., at 4 (emphasis added). See id., at 37.

4) AMERICAN BAR FOUNDATION ("ABF") STUDY (MINNESOTA LAW REVIEW ARTICLE) (1990) – Stephen Daniels and Joanne Martin, Senior Research Fellow and Associate Director, respectively, of the American Bar Foundation ("ABF") examined 25,627 jury verdicts handed down in state trial courts from 1981 to 1985, a period deliberately selected because of the assertedly large numbers of excessive punitive damages awarded during the early 1980's. Stephen Daniels and Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 28 (1990). Daniels and Martin drew data from state jury verdict reporters in 47 counties in eleven states. The sample was regionally balanced in areas of "varying population sizes and socio-economic make-ups." Id. at 29.

Like the researchers who published the three studies that preceded their own, Daniels and Martin found little empirical support for the notion that punitive damages were routinely awarded, that such damages were routinely awarded in large, let alone excessive, amounts, that the number of awards was rapidly increasing, that the size of awards were exponentially expanding, or that whatever problems may have existed on any score in any location was representative of a problem that was truly national in scope and did not represent a merely local anomaly.

Thus, for example, Daniels and Martin found that: punitive damages were awarded in only 34 (8.9%) of the 967 products liability cases evaluated. Id., at 38. See id., Table V. The ABF researchers identified a second major controversy in punitive damages as the "debate over the dollar value of punitive damage awards." Id. at 39. Daniels and Martin not only found that punitive damage awards were unusual, but also relatively small. The median punitive damages award in jurisdictions having 10 or more punitive awards ranged from under $10,000 in some counties to as high as $204,000 in San Diego. Id. at 42. They concluded that, contrary to the claims made by various so-called "tort-reformers":

> punitive damages were not routinely awarded. Nor were punitive damages typically given in amounts that "boggle the mind." Juries awarded punitive damages infrequently, and when they were awarded, the amount was generally modest. . . . The punitive damages system that emerges from this study is significantly different than the system described by the [tort] reformers, and does not provide evidence of a nationwide problem. Thus, one should view with skepticism the claims that juries routinely awarded punitive damages in large amounts, and that these developments were nationwide in scope.

Id., at 43 (emphasis added).

Finally, Daniels and Martin confirmed the results recorded by other researchers -- that punitive damages were not increasing rapidly in number or size, see id., at 43-57, nor were they "out of proportion", let alone "grossly" or "excessively" so. See id., at 57-62.

5) **RUSTAD-KOENIG STUDY (1991)** -- Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts (1991), by Suffolk University Law Professor Michael Rustad[6] and Northeastern University Professor of Sociology Thomas Koenig[7] is not just the most recent empirical study but also the most comprehensive.[8] Unlike the previously-discussed empirical studies, each of which sampled data from just a few cities, counties, or studies and/or for a relatively short (less than five years) period of time, the Rustad-Koenig Study collected and examined data from every conceivable source -- (a) published and non-published opinions, (b) law review articles and commentaries, (c) court records, (d) computer databases, (e) specialized, single-topic or single-topic trial verdict newsletters and reporters, (f) state and regional reporters, and (g) questionnaires sent to and (h) follow-up interviews with plaintiffs' and defense attorneys -- regarding every products liability case filed anywhere in the United States during the 25 year period from 1965 through 1990 that resulted in a punitive damages award. See Rustad-Koenig Study at 1-21. The findings included the following:

(A) Punitive damages were rarely awarded in products liability cases -- Of all the products liability cases nationwide over the twenty-five years from 1965 to 1990, punitive damages were awarded in only 355 cases; of those cases 95 (27%) involved asbestos. The researchers located seven awards from 1965 through 1970 (none for asbestos) and seventeen awards from 1971 through 1975 (again, none for asbestos). As reflected in the following chart, between 1976 and 1980, awards increased to forty-one (as the first two awards of punitive damages in asbestos cases were rendered -- 12% of the total) and increased again between 1981 and 1985 to 139 (including 20 awards in asbestos cases -- 39% of the total). Finally, between 1986 and 1990, the total number of awards increased to 151 cases (including 73 asbestos cases -- 43% of the total). Rustad-Koenig Study at 23-25.

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[6] Professor Rustad is Counsel of Record on this brief.

[7] Professor Koenig is one of the amici on this brief.

[8] See also Michael Rustad, In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes With Empirical Data, forthcoming in 77 Iowa L. Rev. 1 (1993); Michael Rustad and Thomas Koenig, The Historical and Contemporary Functions of Punitive Damages: Reforming the Tort Reformers, forthcoming in 42 Am. Univ. L. Rev. (1993); Thomas Koenig and Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, forthcoming in 14 Just. System J. (1993); Providing for a Uniform Product Liability Law, Hearings on S. 640 Before the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. 6-7, Sept. 19, 1991 (Testimony of Professors Michael Rustad and Thomas Koenig); Product Liability, Hearing Before the Subcomm. on Technology and Competitiveness of the Comm. on Science, Space, and Technology, U.S. House of Representatives, 102d Cong., 2d Sess. 283-310, Aug. 4, 1992 (Testimony of Professors Thomas Koenig and Michael Rustad).

TABLE I

YEARS	ASBESTOS CASES Absolute and Percentage Increase + or Decline - from Previous Five Years	NON-ASBESTOS CASES Absolute and Percentage Increase + or Decline - from Previous Five Years	TOTAL CASES Absolute and Percentage Increase + or Decline - from Previous Five Years
1965-1970	0 N/A N/A	7 N/A N/A	7 N/A N/A
1971-1975	0 0 N/A	17 +10 +142%	17 +10 +142%
1976-1980	2 +2 N/A	39 +22 +129%	41 +24 +141%
1981-1985	20 +18 +900%	119 +80 +205%	139 +98 +239%
1986-1990	73 +53 +265%	78 *-41* *-65%*	151 +32 +8%
TOTALS	**95**	**260**	355

(B) **The Rate of Increase of Non-Asbestos Punitive Damages Awards Slowed from 1981 to 1985 and Declined from 1986 to 1990** -- Although these numbers reveal an absolute increase in the number of punitive damages awards during the years studied, they also demonstrate two highly significant countervailing trends: **first**, a relative slowdown in the rate of growth of both asbestos-related and non-asbestos punitive damages awards from the third five year period to the fourth (from 41 to 139 -- a rise of 239%) and from the fourth five-year period to the fifth (from 139 to 151 -- a rise of 8%); and **second, both an absolute and relative decline in number of non-asbestos cases from the penultimate five year period to the final five-year period (dropping from 119 to 78 -- a decrease of 65%).** Put differently, once asbestos-related cases are controlled for, the number of punitive damages awards in products liability cases declined from 1986 to 1990. Thus, despite the conjectures of some commentators, the fears of non-asbestos defendants, and, perhaps, the expectations of some plaintiffs' lawyers, the pattern developed in asbestos cases has not been followed in litigation involving other products; asbestos has been, and remains, a sui generis mass tort. Rustad-Koenig Study at 23-25.

(C) **Punitive Damages Awards Are Frequently Reversed or Reduced After Trial** -- The figures incorporated in the preceding table represent the number of awards rendered at trial, not the number of awards upheld (in whole or in part) on appeal, nor the number of awards eventually collected (in whole or in part), either after trial or after appeals. Post-trial

case dispositions, as reflected in the following table, reveal that less than one-quarter (78 awards or 22%) of all punitive damages awarded were completely upheld on appeal, while a greater portion of all awards (90 awards or 25%) were either completely reversed or wholly or partially remitted). Rustad-Koenig Study at 27.

Media accounts of punitive damages awards tend to report the amounts awarded at trial, but rarely report post-trial reductions. Unfortunately, much of the debate concerning the "skyrocketing size" of punitive damages awards has likewise focused on the amounts awarded by juries and not the sums remitted by trial judges, let alone the dispositions rendered by appellate court.

The Rustad-Koenig Study revealed, however, contrary to popular assumption, that in three out of every four verdicts decided in the late 1960's, appellate courts reversed or adjusted downward the punitive damages awarded at trial. Since those first cases, slightly over half of the punitive awards at trial have been reversed or adjusted downward by appellate courts. In the 1970's, appellate courts affirmed 47% of the decisions they reviewed (14 of 30 trial verdicts). In the 1980's, appellate courts affirmed 46 percent of trial verdicts. The largest punitive damages awards are most likely to be reduced or eliminated post-trial. Indeed, only 11.2% of all punitive damages awards of $10 million or more were collected.

The systematic Rustad-Koenig Study of post-trial modifications of punitive damages awards paints a picture similar to that of the GAO study and one very dissimilar to the partial anecdotes printed by the media and others. The following table summarizes

the disposition of the cases that were analyzed by the Rustad-Koenig researchers.

TABLE II

CASE DISPOSITION	No.	%
Award completely affirmed on appeal	78	22%
Award wholly reversed or partly remitted	90	25%
Case settled and award collected while appeal was pending	128	36%
Case (and collection of award) stayed in bankruptcy	37	10%
Appeal still pending	22	6%
TOTAL	355	99%

As reflected in the preceding table, of the cases that were appealed, almost half (48%) were affirmed in their entirety. On the other hand, in slightly over half of these cases (52%), the awards were reduced. Although compensatory damages were affirmed in 73% of these cases, punitive damages were affirmed in only 55%, suggesting greater appellate scrutiny for awards of punitive damages. Rustad-Koenig Study at 30-32. In sum, slightly more than half of the verdicts were reversed or reduced on appeal and punitive damages were completely erased in 40% of those cases. Rustad-Koenig Study at 27, 31.

(D) <u>Awards of Compensatory Damages Are Upheld More Regularly Than Are Awards of Punitive Damages</u> -- In 14% of the appellate decisions (22 cases), the plaintiff received no compensatory damages. The median compensatory award allowed by appellate courts was $212,783 or 42% of the original compensatory portion of the

verdict. Punitive damages fared far worse, with 37% of the plaintiffs receiving nothing. The median punitive award, when any money was received, was $135,000, or 23% of the original punitive damages awarded at trial. Rustad-Koenig Study at 32.

(E) **Punitive Damages Awards Are Not "Skyrocketing" in Size and Are More Than Double the Size of Compensatory Damages Awards in Less Than Half the Cases** -- As stated earlier, punitive damages awards occur much less frequently than is generally believed. Also contrary to popular belief, the size of punitive damages awards is much smaller than is generally believed. Although almost all of the popular attention focuses upon the million - dollar verdicts, juries awarded such verdicts in only 36% of the cases.

To be sure, awards of punitive damages exceeded awards of compensatory damages in 208 (59%) of the cases reported in the Rustad-Koenig Study. Moreover, in 38% of the cases reported, punitive damages more than doubled the amount of compensatory damages. On the other hand, compensatory damages exceeded punitive damages in 35% of the cases and more than doubled the size of the punitive awards in 23%. Rustad-Koenig Study at 28-29.

The median compensatory damage award for the 355 cases found was $500,100. The median punitive damages award for the 355 cases was $625,000, i.e., only 25% higher than the median compensatory award. Both figures are fully consistent with those depicted in the RAND-ICJ Study. Rustad-Koenig at 29. When adjusted for inflation, this punitive damages award median is quite similar to the RAND-ICJ figures. That study found that a number of extremely large awards raised the average and accounted for a majority of total amounts awarded. The RAND-ICJ

median for the total award, including both compensatory and punitive damages, is $1,457,600. One-fourth of these total awards were $500,000 or less. When inflation was controlled for (through the use of constant 1983 dollars), the median punitive damages award was $688,500, as compared with $516,000 in compensatory damages. Rustad-Koenig Study at 28-29.

SUMMARY OF THE FINDINGS AND CONCLUSIONS OF THE FIVE EMPIRICAL STUDIES

The five reports discussed above are remarkable for four things:

a) the diversity of their authorship and sponsorship -- being published, respectively, by two leading lights of the "Law and Economics" school of legal scholarship, a private research foundation supported by "pooled grants from corporations, private foundations, trade and professional associations and individuals," RAND-ICJ at i, the U.S. Government, a think tank affiliated with the American Bar Association, and a series of major law review articles;

b) their common methodical approach to gathering and analyzing empirical data;

c) the consistency of their findings and conclusions; and

d) their common findings refute many of the anecdotal myths that fuel the controversy about punitive damages.

III. THE TEXACO STUDY PROVIDES TOO LITTLE ANALYSIS TO SUPPORT THE AMICI'S ARGUMENT THAT PUNITIVE DAMAGES ARE IN DIRE NEED OF SUBSTANTIVE OR PROCEDURAL REFORM

How, then, does the Texaco Study[9], which is relied on by a number of Petitioner's amici, fare in comparison? Unlike the other studies, the Texaco Study found that "[a]fter correcting for inflation, the amount of punitive damages increased 89 times over" during the twenty year period from 1968-71 to 1988-91, a "growth rate of punitive damages [that] has dwarfed the growth in the productive sectors of the economy." Texaco Study at v. This finding is open to some questions, which, because of the inadequacies of Texaco's presentation of data, are difficult to answer. For example:

a) Texaco's in-house lawyers and outside counsel, who authored the Texaco Study, analyze only appellate decisions, in clear violation of Judge Posner's and Professor Landes' admonition that such a choice biases the results in favor of finding huge awards. Landes and Posner, The Economic Structure of Tort Law (1987), at 302-03;

b) Texaco's lawyers report only awards that were affirmed on appeal; they do not report cases where judicial controls were successfully applied. Such post-trial reductions and reversals are a critical part of the procedural

[9] Stephen M. Turner, Lawrence R. Jerz, & Robert E. Fuller, George S. Branch, and James D. Miller, Punitive Damages Explosion: Fact or Fiction?, Washington Legal Foundation, (Nov. 1992)

reforms mandated by Haslip and, therefore, are an essential part of understanding the judicial checks on awards of punitive damages. By ignoring the punitive damages awards that were reversed or remitted by trial and appellate courts, Texaco's lawyers present a distorted view of the punitive damages picture.

c) Texaco's lawyers, unlike the researchers responsible for the studies discussed above, did not cross-classify the number and size of punitive damages awards by substantive fields, e.g., products liability, insurance bad faith actions, or employment discrimination. The failure of Texaco's lawyers to cross-classify, by substantive area and product type, the data they collected, also makes it difficult for a reader to determine the fields in which punitive damage awards are growing or whether the increase reported is due to the expansion of the remedy to such new fields as employment discrimination or insurance bad faith, as opposed to more traditional spheres like intentional torts. For example, it is impossible for the Court to know how many of the punitive awards from Texas, New York and California are attributable to asbestos litigation, which is generally regarded as unique.

Without disaggregation of these awards, it is unclear whether there is any cause for concern because, in these five large commercial states, which together contain 36 percent of the U.S. population, the authors found only 433 punitive damages awards against business which were upheld upon appeal during the period of 1988-1991. Texaco Study at 2. Although this figure is 4.7 times the number of cases Texaco's lawyers located in the 1968-1971 period, the unaggregated awards still averaged only 108 cases per year; and

d) Texaco's lawyers report only "mean" awards, rather than both the "median" and "mean" awards

employed by other researchers. As the ABF's researchers explained:

> A seemingly esoteric, technical debate underlines the issue of punitive damage award size as well as the issue of jury award sizes generally. It involves the appropriate measure of central tendency to use in describing patterns and changes in the typical award: the arithmetic mean (average) or the median. One obtains the mean, or average, punitive damage award by adding the amount of the awards together and dividing by the total number of awards. The mean's disadvantage is that a few unusually high or low figures in the data can skew the result upward or downward. The median punitive damage award, on the other hand is the middle figure in a sequence of awards listed from highest to lowest. A handful of high or low numbers in the data will not influence the median. The chosen measure is both politically and practically significant because the two measures can give significantly different values to the typical award.
>
> The [tort] reformers advocate the use and appropriateness of the mean to describe patterns and changes in award size. Their position is politically expedient because mean punitive damage awards, as well as mean jury awards generally, are misleadingly high.[10]

Daniels and Martin, Myth and Reality in Punitive Damages, at 39 (footnotes omitted; emphasis added). "[A]s a technical matter, the median is more appropriate" in comparing punitive damage awards. Id. at 40 (citing "a widely used textbook on statistics for the social sciences", Hubert Blalock, Social Statistics 55 (rev. 2d ed. 1979)).

In sum, we look forward to a more detailed report from Texaco. Until Texaco's attorneys present their data and analytical techniques in the methodologically rigorous fashion employed by the other researchers, we must reserve judgment on the accuracy of Texaco's findings and the validity of its conclusions.

---

[10] For example, a single enormous award like the $3 billion in punitive damages assessed against Texaco for tortiously inducing Getty to breach its contract with Pennzoil (Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, (2d Cir. 1986), rev'd, 481 U.S. 1 (1987)), can tremendously skew a mean-based study. Thus, if there were 99 awards for $1 each and one award for $3 billion, the mean (average) award would be over $30 million, but that statistic would be highly misleading to anyone trying to assess the pattern of awards.

CONCLUSION

For the reasons set forth above, amici respectfully request that this Honorable Court leave undisturbed the decision of the Supreme Court of West Virginia.

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FILED
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[illegible] UNITED STATES
[illegible] TERM, 1993

TXO PRODUCTION CORP.

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

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INTEREST OF *AMICI*

Amici curiae, the Attorneys General of the States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Washington, and West Virginia, and of the Commonwealths of Kentucky and Pennsylvania, have a strong interest in this case because they are responsible for the public enforcement of laws protecting public health, safety and welfare.[1] *Amici* file this brief to urge the Court not to construe the Due Process Clause of the Fourteenth Amendment to prevent States from using punitive and exemplary damages to enforce important state policies and to deter egregious wrongful behavior directed at their citizens.

Almost all the Attorneys General are also directly responsible for enforcement of the criminal laws within their respective States. They therefore have a strong interest in avoiding an unwarranted construction of the Due Process Clause that would cast criminal sentencing procedures into constitutional doubt.

More broadly, the Attorneys General maintain a strong interest in preserving the appropriate balance of regulatory authority between the States and the federal government in our system of federalism.

As this brief will demonstrate, this case strongly implicates each of these interests.

SUMMARY OF THE ARGUMENT

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court strongly reaffirmed what has been the case law for centuries: that punitive damages may be assessed to punish and deter malicious wrongdoing. In Part I of this

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[1] The Attorneys General of the States of Alabama, Arkansas, Montana, North Carolina, and Washington join in Sections III and IV, and in the Conclusion, of this brief. The Attorney General of the State of West Virginia joins in this brief for the purpose of supporting the findings and decision of the Supreme Court of Appeals of West Virginia in the case under consideration.

brief, the Attorneys General urge this Court not to undermine that basic principle in the instant case, particularly where wrongdoing implicates fundamental state interests by threatening the system of consensual commercial exchange through contract and the sanctity of private property that lie at the heart of our economic system. The Attorneys General demonstrate that an award of punitive damages reasonably necessary to achieve the aims of deterrence and punishment does not violate substantive due process simply because it is significantly more than the plaintiff's out-of-pocket loss in the case and more than awards in other jurisdictions or against other defendants. Indeed, it is often the case that substantial punitive damages are needed where compensatory damages are modest, precisely in order to ensure that the State's objectives of deterrence and punishment are met.

In Part II, the Attorneys General urge this Court not to create a sweeping "proportionality" doctrine that would permit federal courts to invalidate state policies on the basis of the courts' own theories of "rational" deterrence or "retributive justice" and without regard to the interests articulated by the State. Such a doctrine would upset many settled state sentencing procedures.

In Part III, the Attorneys General show that this Court, having in *Haslip* approved fully adequate procedural protections which ensure that the requirements of due process are satisfied, should decline to go further and adopt any of the plethora of additional procedural measures proposed by petitioner TXO Production Corp. and its *amici*. This Court should not become an ongoing regulator of state punitive damages procedures, nor should this Court accept the thinly veiled invitation of TXO and its *amici* to transplant this Court's capital punishment jurisprudence to the punitive damages context.

Finally, in Part IV, *amici* demonstrate that States are responding to the punitive damages issue in responsible and politically accountable ways. This Court's decision in *Haslip* has provided all the constitutional guidance that is necessary. The matter is now chiefly a political one, to be decided by the People's elected representatives.

In sum, the present case does not raise the question of the assessment of multiple punitive awards for a single act or any of

the other issues that have led some to question the wisdom and fairness of punitive damages. This case involves the kind of deliberate, evil-minded wrongdoing that has given rise to punitive damages in this country for centuries. It is precisely the kind of case in which punitive damages function well, and uncontroversially, to vindicate state policy objectives through private enforcement and deterrence of serious harmful conduct.

ARGUMENT

I. IMPOSING A REQUIREMENT OF PROPORTIONALITY BETWEEN PUNITIVE AND COMPENSATORY DAMAGES WOULD IMPEDE THE STATES' INTEREST IN IMPOSING PUNITIVE DAMAGE AWARDS TO PUNISH AND DETER INTENTIONAL WRONGDOING

A. Punitive Damages Advance Important State Interests

"Punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *see also Molzof v. United States*, 112 S. Ct. 711, 715, 717 (1992). In assessing the rational basis for punitive damages, this Court should give full consideration to the important role punitive damages play in advancing state policy objectives. Far from being a mere windfall to successful private litigants, punitive damages are an important adjunct to the States' efforts to enforce laws protecting consumers, the environment, and the public health and welfare in general.

First, the availability of punitive damages encourages private litigants to vindicate their rights in court. Particularly in cases such as the present one where out-of-pocket losses are small and noneconomic losses are uncertain, the availability of punitive awards provides a meaningful spur for private citizens to redress injuries done to them.

Second, punitive awards serve law enforcement purposes by providing an effective deterrent to conduct which might otherwise be profitable. The vast majority of States have decided, after substantial legislative deliberation in recent years, to retain

punitive damages as an important component of a comprehensive strategy for maximizing adherence to consumer, environmental, and public health and safety laws.[2]

Moreover, the availability of punitive damages is especially important in the present context because the States have a vital interest in protecting the system of private property and consensual commercial exchange through contract. Business in a State must be free, open and fair to all. A critical "rationale for punitive damages is their role of protecting the sanctity of the market system's structure of consensual exchange and production" and preventing parties from achieving by theft what they cannot achieve by market transactions. Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* 200 (1988). Fraud and slander of title are among those types of business torts that run counter to the basic premises of the free enterprise system; of course, in this case, the West Virginia Supreme Court upheld the jury's finding that TXO had committed just this type of tort.

B. The Reasonableness of a Punitive Damages Award Cannot be Judged Merely by the Size of the Accompanying Award of Compensatory Damages, by Awards in Other Jurisdictions, or by Awards Against Other Defendants

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court endorsed the States' use of punitive damages "to punish what has occurred and to deter its repetition." *Id.* at 1045. The Court discussed the criteria employed by the Alabama courts to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution":

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[2] Only Puerto Rico and Nebraska have chosen not to utilize punitive damages in any instance. Louisiana, Massachusetts, New Hampshire and Washington allow punitive damages only if they are expressly provided for by statute. By contrast, the remaining 45 States have indicated by statutory enactment or recent decision their approval of the constitutionality and usefulness of punitive damages.

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. The application of these standards, this Court concluded, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" and "ensures that punitive damages awards . . . have some *understandable relationship* to compensatory damages." *Id.* (emphasis added).

Thus, it is through the application of the factors discussed in *Haslip* — and not by the application of a proportionality review, comparison with awards in other jurisdictions, or other factors formulated by TXO — that punitive damages have an "understandable relationship" with compensatory damages. The "objective criteria" isolated in *Haslip*, *id.* at 1046, emphasize the principal role of punitive damages in punishing and deterring wrongful conduct. This Court did not envision some sort of arbitrary mathematical ratio or even a range of ratios between punitive and compensatory damages. Indeed, it expressly disavowed such an approach. *Id.* at 1043.

To focus exclusively on the actual harm caused by a defendant's conduct would be to exalt one of the factors identified in *Haslip* above all the others, or in the case of the additional factors advocated by TXO (such as "awards upheld against

other defendants in the same jurisdiction," Petitioner's Brief ("Pet. Br.") at 16), to introduce factors not even mentioned by this Court in *Haslip*. To replace *Haslip*'s "objective criteria," 111 S. Ct. at 1046, with petitioner's homespun "objective indicia" (Pet. Br. 16) would require nothing less than overruling *Haslip*.

Moreover, TXO's proposed calculus ignores the different circumstances of individual cases and the varying requirements of deterrence. Thus, the kind of intra-jurisdictional and inter-jurisdictional comparisons that TXO advocates in this case were squarely rejected by this Court in *Harmelin v. Michigan*, 111 S. Ct. 2680, 2696-99 (1991) (opinion of Scalia, J.); *id.* at 2704, 2707 (Kennedy, J., concurring in part and concurring in the judgment). To look to a plaintiff's out-of-pocket loss, to awards against other defendants, or to awards in other jurisdictions is misguided because it would ignore the *raison d'etre* of punitive damages: deterring and punishing wrongful conduct. Although as a general rule the factors on which TXO relies in assessing the reasonableness of punitive damages may not be irrelevant, they alone cannot be dispositive. For example, comparing awards against different defendants could well be an exercise in apples and oranges. As the West Virginia Supreme Court commented in the case under review, "an award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's." Appendix to Petition for Certiorari, at 39a.

Similarly, in at least *some* cases deterrence will require that punitive damages exceed compensatory damages or out-of-pocket losses by a significant sum. As Justice Neely, who authored the decision below, explained in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991):

> Punitive damages are necessary when compensatory damages are not large enough to convince a defendant or future defendants to take precautions against similar problems. For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.

Id. at 901-902 (citation omitted).

Indeed, punitive damages are most critically needed where a defendant's conduct carries the risk of great social cost but results in a particular case in a relatively small award of compensatory damages, or where a defendant expects to profit immensely from wrongdoing but the plaintiff suffers relatively few losses. In such situations, the mathematical ratio of punitive damages to compensatory damages is likely to be high, and the damages awarded may be greater than those typically recovered in other jurisdictions or against other defendants. But to invalidate the punitive damages award on those bases would run directly counter to the very purpose of punitive damages — to serve the social interest by deterring harmful conduct. Thus, if there is to be a "proportionality" inquiry, it should focus on the relationship between the award and both the *size of the wrongdoer's expected gain* and the *social cost* of the kind of activity in which the defendant has engaged. The damages award must also be judged with reference to (a) the probability that the wrongdoer would not be detected or punished and (b) whether the wrongdoer himself has covered up the extent of the plaintiff's actual damages or otherwise made them difficult to prove.

The Attorneys General urge this Court to reject any proportionality test that fails to consider whether the actual or out-of-pocket damages awarded by a jury are a reliable surrogate for the harm that the wrongdoer intended to cause, the benefit that the wrongdoer intended to reap, and the potential social costs of the wrongdoer's conduct. The Attorneys General also stress that the Due Process Clause "is not intended to embody a particular economic theory," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), and does not require the States to adopt any particular socioeconomic assumptions as the basis of their systems of punitive damages. *See also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (the "Constitution does not require the States to subscribe to any

particular economic theory"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (the Excessive Fines Clause is "not an economic primer on what factors best further the goals of punishment and deterrence"). In particular, due process does not require States which use punitive damages as deterrence to adopt as their lodestar the theory of "optimal" or "rational" deterrence advanced by TXO. *See* Pet. Br. 27-30. To the contrary, States are free to conclude that "an efficient legal system would try to eradicate property violations, not seek to optimize them." David D. Haddock, Fred S. McChesney, & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1, 29 (1990).

C. There is No Need for "Heightened Scrutiny" Simply Because the State Policy is Implemented Through the Judicial System Rather Than by the Legislature

Because punitive damages are at bottom a form of state economic and public welfare regulation, substantive due process scrutiny of state rules for punitive damages awards should be governed by the deferential "rational basis" standard of review applicable to state regulations that do not infringe fundamental rights. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). There is no need for heightened scrutiny on the asserted ground that punitive damages are imposed by civil juries rather than by state legislatures. Ever since de Tocqueville's *Democracy in America*, the function of the jury in American political life has been well-recognized. "[T]he jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct." *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991). Obviously, the jury's ability to fine-tune the regulatory functions of civil law to the circumstances of the individual case, and to apply a standard that the legislature remains free to alter, could not be performed by any other branch of government.

Furthermore, the States have overriding and constitutionally protected interests in allocating responsibilities as they see fit among their legislative, executive, and judicial branches. *See New York v. United States*, 112 S. Ct. 2408, 2418, 2421, 2432-33 (1992) (discussing Tenth Amendment and Guarantee Clause); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991). A State is free to impose punitive damages on common-law offenses as well as on statutory violations. There is, moreover, a complex dialectic among the branches of state government. For example, in many States, the legislature has restricted the ability of juries to impose punitive damages. See Part IV, *infra*. When a state legislature has *not* done so, its choice reflects acceptance of what is being done in judicial proceedings.

In sum, this Court should apply the same rational basis scrutiny to state systems of jury-awarded punitive damages that it does to state and federal socioeconomic legislation.

II. CREATION OF "PROPORTIONALITY REVIEW" BASED ON THE EXTENT OF THE "WRONG INFLICTED" WOULD THREATEN CRIMINAL SENTENCING PROCEEDINGS

TXO, focusing on the compensatory damages awarded to the respondents in this case and on their out-of-pocket losses, insists that principles of retributive justice limit punitive damages — as well as criminal penalties — "to an amount proportional to the wrong inflicted." Pet. Br. 26. The Attorneys General submit that this proposition would work a revolution in state criminal law and as well as in punitive damages law.

It is axiomatic that a criminal defendant, if convicted, may be punished according to state penal policies regardless of the extent of the damage he caused in his particular case, and even if he caused no palpable harm at all. Thus, there can be no question that a State, like Congress, "has the power to define criminal punishments without giving the courts any sentencing discretion" to account for the absence of any concrete social harm in individual cases. *See Chapman v. United States*, 111 S. Ct. 1919, 1928 (1991). Although in some contexts the "wrong inflicted" may be a relevant *factor* in sentencing — particularly

in increasing the criminal sanction imposed, *see, e.g.*, *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) — a sentence cannot be said to be disproportionate merely because a defendant happened (fortuitously or otherwise) not to cause appreciable social harm in the particular case at issue. Thus, the West Virginia Constitution provides that "[p]enalties shall be proportioned to the *character* and *degree* of the offense," Art. III, § 5 (emphasis added), not according to the precise social impact of the particular defendant's conduct. If there is to be a proportionality inquiry,[3] the inquiry must center on the *type* of behavior in which the defendant has engaged, not on whether the defendant in the particular case at issue caused substantial out-of-pocket losses to the victim.

III. THIS COURT SHOULD NOT BECOME AN ONGOING REGULATOR OF THE SUFFICIENCY OF STATE PROCEDURES FOR ASSESSING PUNITIVE DAMAGES

In an *amicus* brief before this Court in *Haslip*, the Attorneys General of Alabama, California, and Texas warned that those attempting to craft judicial limits on state procedures for imposing punitive damages were inviting this Court to enter a judicial thicket comparable to that of the capital sentencing context. The Attorneys General warned that "[t]he due process arguments advanced by petitioner here are strikingly similar to those that led to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976). . . . [T]here is every reason to expect that resourceful counsel will bring to the courts an endless progression of due process challenges to punitive damages." Brief *Amicus Curiae* of the

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[3] *See Harmelin v. Michigan*, 111 S. Ct. 2680, 2686-91 (1991) (opinion of Scalia, J.) (Eighth Amendment and antecedent English tradition contains no proportionality requirement); *id.* at 2705 (Kennedy, J., concurring in part and concurring in the judgment) ("the Eighth Amendment does not require strict proportionality between crime and sentence" but forbids "only extreme sentences that are 'grossly disproportionate' to the crime").

Attorneys General of Alabama, California, and Texas in Support of Respondents, in No. 89-1279, at 12 (filed July 16, 1990).

That prediction has proved prophetic. The procedural safeguards sought by TXO and its *amici* include not only proportionality review,[4] but also a right to a bifurcated proceeding;[5] a right to admission of mitigating factors in the form of evidence relating to previous punitive damages awards against a defendant for the same course of conduct[6] and evidence relating to a defendant's attempts to comply with the law;[7] and a right to the exclusion of evidence relating to a defendant's wealth,[8] although at least one *amicus* representing corporate interests tries to have it both ways on this point.[9] Indeed, some *amici* would have this Court *go beyond* what the Eighth Amendment requires even in the death penalty context, by prescribing the "aggravating factors" that would constitute the

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[4] *Compare Pulley v. Harris*, 465 U.S. 37, 43-51 (1984) (no proportionality review required in a *criminal* case).

[5] See Brief of Product Liability Advisory Council, Inc., in Support of Petitioner, in No. 92-479, at 28 (filed Jan. 22, 1993).

[6] See Brief of Owens-Illinois, Inc. and Texaco, Inc. in Support of Petitioner in No. 92-479, at 17 (filed Jan. 22, 1993); Brief of Center for Claims Resolution in Support of Petitioner in No. 92-479, at 11 (filed Jan. 22, 1993).

[7] *See* Brief of Equal Employment Advisory Council in Support of Petitioner in No. 92-479, at 23 (filed Jan. 22, 1993).

[8] *See* Brief of Product Liability Advisory Council, Inc. in Support of Petitioner in No. 92-479, at 28-29 (filed Jan. 22, 1993); Brief of Owens-Illinois, Inc. and Texaco, Inc., in Support of Petitioner in No. 92-479, at 14 (filed Jan. 22, 1993).

[9] *See* Brief for the American Tort Reform Association, et al., Supporting Petitioner in No. 92-479, at 17-18 (filed Jan. 22, 1993) (arguing that "[t]here is, of course, a strong historical basis for considering poor financial condition as a *mitigating* factor in setting monetary punishments. And wealth may justify enhancing punitive damages for *individuals*," but insisting that wealth should not be a factor in justifying the imposition of punitive damages against "large, publicly held corporations.") (emphases in original).

exclusive bases on which States could impose punitive damages[10] and by decreeing strict mathematical ratios for punitive damages[11] — although several of TXO's *amici* concede "the inherent arbitrariness of a simple mathematical formula to determine punitive damages" and recognize that "it would be sheer fortuity if punitive damages awards that were determined only by reference to some multiple of compensatory damages resulted in rational awards."[12]

In *Haslip*, this Court approved baseline procedural protections that fully implement the requirements of due process. There is no need to go further by transplanting this Court's elaborate death penalty jurisprudence to the punitive damages context. Moreover, there is no need to countenance the contradictory positions taken by TXO and its *amici* in this case, which are exactly parallel to the tensions in the Court's death penalty jurisprudence identified by Justice Scalia in *Walton v. Arizona*, 497 U.S. 639, 656-674 (1990) (Scalia, J., concurring in part and concurring in the judgment). In its substantive due process argument, TXO claims that proportionality principles dating to Magna Carta require that a punitive damages award must be tailored according to the individual defendant's culpability. The punishment must fit the crime. Pet. Br. 25. But, when it comes to procedural due process, TXO insists that "jury discretion [must] be channelled," *see id.* at 33 — making impossible the kind of individualistic inquiry that is supposedly necessary to achieve proportionality. We are told that considerations of wealth must be excluded; aggravating factors must be closely circumscribed; perhaps even mathematical ratios are necessary. TXO itself maintains that the reasonableness of a punitive

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[10] *See* Brief of American Automobile Manufacturers Association, et al., Supporting Petitioner in No. 92-479, at 18-20 (filed Jan. 22, 1993) (proposing as the sole bases of punitive damages the "intentional infliction of harm" and the "conscious disregard of safety").

[11] *See* Brief of the Business Council of Alabama in Support of Petitioner in No. 92-479, at 18 (filed Jan. 22, 1993).

[12] Brief of Arthur Andersen & Co., et al., in Support of Petitioner in No. 92-479, at 13 (filed Jan. 22, 1993).

damage award should be assessed by reference to awards imposed under different circumstances, against different defendants, and in different States. *See* Pet. Br. 16. TXO does not even attempt to explain how this process could possibly produce individualized justice.

Perhaps in the unique context of the Eighth Amendment, where human life is at stake, such contradictions must be tolerated. There is no need to do so here.

IV. PRINCIPLES OF FEDERALISM AND JUDICIAL RESTRAINT DICTATE THAT THIS COURT LEAVE THE ISSUE OF "REFORMING" PUNITIVE DAMAGES TO STATE LEGISLATURES AND COURTS

This Court has repeatedly made clear that, under the Due Process Clause, States must be granted wide latitude to remedy "what are found to be injurious practices in their internal commercial and business affairs." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978) (quoting *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949)). This principle has often been applied in cases involving due process challenges to the procedures through which States seek to vindicate public goals. *See Chandler v. Florida*, 449 U.S. 560, 582-83 (1981); *New Motor Vehicle Bd.*, *supra*.

Our federal structure of government "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). "[S]tate innovation is no judicial myth." *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring). Unemployment insurance, minimum wage laws for women and children, and women's suffrage all originated in the States. *Id.* at 789. Similarly, "[a]fter decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation." *Id.* To promote the development of such sound public policies, this Court has recognized the need to leave breathing space for state experimentation.

Such breathing space is especially warranted now, because the States are in the midst of recrafting punitive damages law, both in response to this Court's mandate in *Haslip* and for reasons of public policy. Diversity among the States is a result of their experimentation and should not be misinterpreted as confusion or as defiance of *Haslip*. The States are the laboratories of democracy and are free to adopt varying approaches with respect to punitive damages so long as they stay within the broad bounds set by due process. After all, *Haslip* did not constitutionalize the Alabama punitive damages scheme.

States have ample practical incentives to limit punitive damages to the level necessary to accomplish important state objectives. States with punitive damages awards that are perceived as "excessive" quickly become known as "bad for business"; such States have difficulty attracting new firms and risk losing existing companies to neighboring jurisdictions. The active concern of States in promoting favorable business climates is manifested throughout the Nation.

The vast majority of States have recently put in place a broad array of measures for guiding and limiting the assessment of punitive damages.[13] Along these lines, a number of States have

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[13] In fact, only five States have *not* enacted tort reform legislation dealing with punitive damages in the past two decades. *See* Thomas Koenig and Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability* (to be published at 42 Am. Univ. L. Rev. (1993)), citing the following examples of reform legislation: Ala. Code § 6-11-20 et seq. (Supp. 1992); Alaska Stat. § 09.17.020 (1992); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1993); Colo. Rev. Stat. Ann. §§ 13-21-102, 12-25-127 (West 1989); Conn. Gen. Stat. Ann. § 52-240b (West 1991) (products liability actions); Fla. Stat. Ann. §§ 768.72 through .74 (West Supp. 1993); Ga. Code Ann. § 51-12-5.1 (Supp. 1992); Idaho Code § 6-1604 (1990); Ill. Ann. Stat. ch. 110, para. 2-604.1, 2-1207 (West Supp. 1992); Ind. Code § 34-4-34-2 (Supp. 1992); Iowa Code Ann. § 668A.1 (West 1987); Kan. Stat. Ann. §§ 60-3701 through 60-3703 (Supp. 1992); Ky. Rev. Stat. §§ 411.184, 411.186 (Michie 1992); Minn. Stat. Ann. §§ 549.19 (West 1988), 549.20 (West 1988 & Supp. 1993); Mo. Ann. Stat. §§ 510.263 (West Supp. 1992), 537.675 (West 1988); Mont. Code Ann. § 27-1-220 & 221 (1991); Nev. Rev. Stat. Ann. § 42.005 and 42.010 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1992); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1991); Ohio Rev. Code Ann. § 2315.21 (Anderson 1991); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases), 18.540, 41.315 (1991); S.C. Code Ann. § 15-33-135 (Supp. 1992); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 et seq. (Vernon Supp. 1993); Utah Code Ann. § 78-18-1 (1992); Va. Code Ann. 8.01-38.1 (Michie 1992).

legislated caps on punitive awards in certain types of cases.[14] At least twelve States have acted to bifurcate the liability and damages phases of trials in which punitive damages are at issue, or require that a judge assess punitive damages once a jury has determined that they are appropriate.[15] Seven States have legislatively prohibited introduction of evidence of a defendant's financial condition until the jury has first determined liability for punitive damages.[16] Most States have established formal procedures for remittitur or post-verdict reduction to guard

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[14] *See* Ala. Code § 6-11-21 (Supp. 1992); Colo. Rev. Stat. Ann. § 13-21-102(1)(a) (West 1989); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(g) (Supp. 1992); Kan. Stat. Ann. §§ 60-3701(e), 60-3402 (Supp. 1992); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); Okla Stat. Ann. tit. 23, § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1993); Va. Code Ann. §§ 8.01-38.1 (Michie 1992).

[15] *E.g.*, Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Ga. Code Ann. § 51-12-5.1(d)(2) (Michie Supp. 1992); Kan. Stat. Ann. §§ 60-3702, 60-3402 (Supp. 1992); Mo. Ann. Stat. § 510.263 (West Supp. 1992); Minn. Stat. Ann. § 549.20(4) (West Supp. 1993); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. Ann. § 42.005(3) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); N.J. Rev. Stat. Ann. § 2A:58C-5 (West 1987); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1991); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).

[16] *See*, Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Md. Code Ann. § 10-913(a) (1989); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(4) (Supp. 1991); N.J. Stat. Ann. § 2A:58C-5(a) (West 1987); Or. Rev. Stat. Ann. § 30.925(2) (1988); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992), Utah Code Ann. § 78-18-1(2) (Michie 1992).

against the imposition of awards tainted by passion or prejudice.[17] Other States have specified additional standards and safeguards for guiding the determination or review of punitive awards ranging from "safe harbor" provisions that exempt defendants from punitive damages if they have complied with government regulations, such as FDA rules,[18] to heightened standards of proof such as "clear and convincing evidence"[19] and even "beyond a reasonable doubt."[20] Finally,

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[17] *See, e.g.*, Ala. Code § 6-11-23 (Michie Supp. 1992); Ark. Code Ann. § 16-64-124 (1987); *Las Palmas Assoc. v. Las Palmas Center Assoc.*, 235 Cal.App.3d 1220, 1 Cal.Rptr.2d 301 (1991), *review denied*, 1992 Cal. LEXIS 752 (Cal. 1992); Colo. Rev. Stat. Ann. § 13-21-102(2) (West 1989); Fla. Stat. Ann. § 768.73(1)(b) (West Supp. 1993); *Pitts Truck Air, Inc. v. Mack Trucks, Inc.*, 173 Ga.App. 801, 803, 328 S.E.2d 416, 418 (1985); *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082, *rehearing denied*, (1991); Ill. Ann. Stat. ch. 110, para. 2-1207 (West Supp. 1992); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D.Iowa 1991); *Medical Mutual v. Evander*, 92 Md. App. 551, 609 A.2d 353, 370 (1992), *cert. denied*, 328 Md. 447, 614 A.2d 973 (1992); *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670 (Minn. App. 1991), *review denied* (1991); Mont. Code Ann. § 27-1-221(7)(c) (1991); *Republic Insurance Company v. Hires*, 810 P.2d 790, 792-93 (Nev. 1991); *Ward v. Terminix Int'l Co.*, 1991 Tenn. App. LEXIS 387 (Tenn. Ct. App. May 29, 1991); *State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590, 596, 606 (Tex. App. El Paso), *rehearing overruled* (1991); Va. Code Ann. § 8.01-38.1 (Michie 1992); *Heidman v. American Family Ins. Group*, 473 N.W.2d 14 (Wis. App. 1991).

[18] The following five States have enacted the "FDA defense": Arizona (Ariz. Rev. Stat. Ann. § 12-701 (West 1992)); New Jersey (N.J. Stat. Ann. § 2A:58C-5(c) (West 1987)); Oregon (Or. Rev. Stat. § 30.927 (1991)); and Utah (Utah Code Ann. § 78-18-1 (Supp. 1990)). Similarly, Illinois prohibits punitive damages in medical and legal malpractice cases (Ill. Ann. Stat. ch. 110, para. 2-1115 (West Supp. 1992)), Ohio requires proof by clear and convincing evidence in products liability cases (Ohio Rev. Code Ann. § 2307.80 (Anderson 1991)), and Oregon has a medical malpractice exception for licensed and registered physicians (Or. Rev. Stat. § 18.550 (1991)).

[19] *See* Alaska Stat. § 09.17.020 (1992); Ala. Code § 6-11-20(a) (Supp. 1992); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 681 (1986); Cal. Civ. Code Ann. § 3294(a) (West Supp. 1993); Fla. Stat. Ann. §§ 768.73-768.74 (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(b) (Michie 1992); *Masaki v. General Motors Corp.*, 71 Haw. 1,

States have limited the access of plaintiffs to awards by enacting distribution restrictions that allocate a portion of every punitive damages award to the state or a source other than the plaintiff.[21]

The extent to which traditional methods for assessing punitive damages should be reformed is not a question readily amenable to judicial resolution. To the extent that punitive damages are perceived as being in need of reform, there is no consensus as to what shape those reforms should take. Different States are trying different approaches, which embody varying values and policies. Important empirical questions as to whether, and to what extent, punitive liability has increased are at the heart of this

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780 P.2d 566, 575 (1989); Ind. Stat. Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Stat. Ann. § 60-3701(c) (Supp. 1992); Ky. Rev. Stat. § 411.184(2) (Michie 1992); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992), *reconsid. denied*, 325 Md. 665, 602 A.2d 1182 (1992); Minn. Stat. Ann. § 549.20(1) (West Supp. 1993); Mont. Code Ann. § 27-1-221(5) (1991); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1991); 1986 Okla. Sess. Laws 315 sec. 1; Or. Rev. Stat. § 41.315(1) (1991); S.C. Code Ann. § 15-33-135 (Supp. 1992); S.D. Codified Laws Ann. § 21-1-4.1 (1987); Utah Code Ann. § 78-18-1(1)(a) (Michie 1992)); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980)..

[20] *See* Colo. Rev. Stat. Ann. § 13-25-127(2) (West 1989).

[21] See Fla. Stat. Ann. § 768.73 (West Supp. 1993) (allocating 60% to either state's general revenue fund or public health trust fund); Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1990) (allocating 75 percent to the state treasury); Ill. Ann. Stat. ch. 110, para. 2-1207 (West Supp. 1992) (allowing judge to apportion damages among plaintiff, plaintiff's attorney, and the Illinois Department of Rehabilitation Services); Iowa Code Ann. § 668A.1(2)(b) (West 1987) (allocating 75% after payment of costs and fees to a civil reparations trust fund); Kan. Stat. Ann. § 60-3402(e) (Supp. 1992) (allocating half of medical malpractice awards to the state treasury); Mo. Ann. Stat. § 537.675 (Vernon 1988) (allocating half of the award after payment of attorney fees to the Tort Victims Compensation Fund); N.Y. Civ. Prac. L. & R. 8701 (Supp. 1993) (allocating 20% to the state); Or. Rev. Stat. § 18.540 (1991) (allocating half of the award to the Criminal Injuries Compensation Account after deducting attorney fees); Utah Code Ann. § 78-18-1 (Michie 1992) (allocating half of any amount in excess of $20,000 to the State Treasury).

policymaking enterprise. Reforms also require difficult policy tradeoffs between deterring harm and promoting a favorable climate for attracting and developing business. These are questions that should be left to the elected representatives of the People in their respective States.

CONCLUSION

This Court should reject the challenges of TXO and its *amici* to the traditional and vitally important role of punitive damages in deterring and punishing egregious misconduct directed at the citizens of the several States.

March 3, 1993

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NO. 92-479

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

TXO CORPORATION,

Petitioner,

v.

ALLIANCE RESOURCES CORP.;
TUG FORK LAND COMPANY;
GEORGE KING; AND
GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Appeals
of West Virginia

BRIEF OF THE ALABAMA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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March 3, 1993

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17 pp

QUESTIONS PRESENTED

Amicus curiae Alabama Trial Lawyers Association will respond to the *amicus curiae* brief of the Business Council of Alabama, filed in support of Petitioner, and will address the following issues:

(1) WHETHER THE AMOUNTS OF POST-*HASLIP* PUNITIVE DAMAGES VERDICTS IN ALABAMA ARE JUSTIFIED BY THE PARTICULAR FACTS, AND, THEREFORE, ARE NOT VIOLATIVE OF DUE PROCESS.

(2) WHETHER THE ANECDOTAL STATISTICS AND LISTS OF ALABAMA VERDICTS IN THE *AMICUS CURIAE* BRIEF OF THE BUSINESS COUNCIL OF ALABAMA ARE INACCURATE AND MISLEADING.

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1 Linda L. Schlueter and Kenneth R. Redden, *Punitive Damages* §2.2(A)(1), p. 24
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INTEREST OF AMICUS CURIAE

The Alabama Trial Lawyers Association is a group of over 1300 Alabama lawyers, most of whom primarily represent individuals who have been injured or harmed through the fault of others. The Alabama Trial Lawyers Association is the only organization in the State of Alabama which, through litigation, appeals, and *amicus curiae* briefs, seeks to protect the rights of average, ordinary Alabama citizens. The benefits to those Alabama citizens of the availability of punitive damages (e.g., punishment and deterrence) would be severely diminished by a constitutionally-mandated "cap" on the amount of punitive damages. Moreover, this amicus is uniquely situated to respond to the allegations about Alabama verdicts contained in the amicus curiae brief of the Business Council of Alabama in support of Petitioner.*

*Pursuant to Rule 37, letters of consent have been filed with the Clerk of Court.

SUMMARY OF THE ARGUMENT

In support of Petitioner, the *amicus curiae* brief of the Business Council of Alabama asserts Alabama courts are not applying the standards set out in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), and punitive damages have reached "epidemic proportions in Alabama." (BCA *amicus* brief p. 3). In support of that drastic declaration, the Business Council of Alabama presents this Court with an anecdotal list of verdicts, a discussion of a few cases in the brief, and an appendix of verdicts which contains major errors and is misleading — especially in that it includes verdicts rendered under Alabama's unique "punitive damages only" wrongful death statute. Furthermore, the few case examples discussed by the Business Council of Alabama are presented in a misleading manner in that the Business Council failed to disclose the egregious conduct of the respective defendants which led the juries to award substantial punitive damages in those cases.

This *amicus* asserts a maximum "cap" on amounts of punitive damages verdicts, such as a mathematical ratio relative to compensatory damages, would neutralize the protection of the general public currently provided by the deterrence and punishment features of punitive damages. The determination of the *amount* of punitive damages appropriate in a given case — subject to judicial review — should remain with the finder of fact. The amount deemed necessary to punish a particular wrongdoer, and to deter that wrongdoer and others similarly situated, will vary widely from case to case depending on such factors as anticipated profitability of the wrongful conduct, the degree of reprehensibility, the frequency of similar past conduct, the degree of harm or likely harm, and wealth of the perpetrator. *See Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986). A mathematical "cap" inhibits use of these important social variables. Importantly, no "cap" is required by Due Process.

I. "EXCESSIVENESS" IS A RELATIVE TERM: THE COMPLETE FACTS OF A PARTICULAR CASE MUST BE CONSIDERED.

The *amicus* brief of the Business Council of Alabama argues the unconstitutionality of punitive damages by, primarily, listing merely the *amounts* of some randomly - collected verdicts. However, the principal point of the majority opinion in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), is that "excessiveness" is judged on a case-by-case basis, with consideration given to: frequency of past misconduct; degree of reprehensibility; potential profitability of the wrongful conduct; and financial position of the defendant. 111 S.Ct. at 1044-45. These factors necessarily vary considerably from one case to another.

The *amicus* brief of the Business Council of Alabama fails to aid this Court in that the "worst-case scenario" verdicts it discusses omit any discussion of the facts on these factors. On the other hand, consideration of the facts in those cases reveal the verdicts to be rationally based and within the state's goals for such damages.

II. THE PURPORTED DATA ABOUT ALABAMA VERDICTS CONTAINED IN THE AMICUS BRIEF OF THE BUSINESS COUNCIL OF ALABAMA ARE INACCURATE AND MISLEADING.

A. *The Particular Alabama Case Examples of Supposedly Excessive Verdicts Omit the Pertinent Facts of Egregious Wrongdoing.*

As an example of what it terms "unbridled jury discretion," page 5 of the Business Council's brief describes the $4 million dollar verdict in *BMW of North America, Inc. v. Gore* (pending in Alabama Supreme Court, Nos. 1920324 and 1920325). The distortion in the Business Council's brief is that it would have this Court believe the *sole* ground for the $4 million verdict was that Gore suffered paint defect dam-

ages of only $4,000. The *full* story is that plaintiff proved BMW's board adopted a corporate policy in 1983 of not disclosing to consumers such damages in its "new" cars. In *Gore*, plaintiff proved BMW made $4 million dollars by its fraudulent scheme. Thus, the punitive damages verdict in *Gore* did nothing more than to remove the wrongful profit from BMW's pockets. Furthermore, the *Gore* case is a perfect example of the efficacy of punitive damages: five days after this verdict was returned in Birmingham, Alabama, BMW's board met in New York and voted to rescind its policy and to, from now on, disclose *all* damages to consumers. Moreover, in a similar case, *Yates v. BMW of North America, Inc.* (pending in the Alabama Court of Civil Appeals, No. 2910714), plaintiff presented evidence BMW failed to disclose damages in almost 6000 cars, and such damage devalued the resale value of such cars by about 10%. At approximately $4,000 per car, that amounts to a wrongful profit to BMW of $24,000,000. Would a punitive verdict predicated only upon the out-of-pocket losses of the car owner ($4,000) have changed BMW's corporate policy?

At pages 5-6, the Business Council refers to the $25 million dollar verdict in *Northwestern Mut. Life Ins. Co. v. Sheridan* (pending in the Alabama Supreme Court, No. 1911110). The statement at page 6, that Northwestern offered refunds when it "found the problem" is seriously misleading. (The "problem" is illustrated by the facts in this case: agent Behr sold the Sheridans a retirement plan, but he pocketed most of the premium and actually ordered only some small insurance policies, which the Sheridans did not want and did not know about.) The evidence disclosed numerous co-workers of the "bad" agent (Behr) had complained to Northwestern management *for years* that he was stealing from clients and committing other frauds. The company intentionally ignored the problem because the agent was a top producer. Furthermore, prior to being hired by Northwestern, Behr had been sued 16 times in two years, had several judgments recorded against him, and had 171 judgments recorded against Behr's, Inc.,

his alter ego. Northwestern knew Behr's application was false, approved him anyway, yet it asserted to the State of Alabama it had investigated Behr and found him in good business standing. While in Northwestern's employ, a federal judge found Behr violated the federal odometer fraud statute, and Northwestern knew about this. Northwestern also knew Behr was forging client names and addresses — yet it did nothing. It was only *after* the *Sheridan* case that Northwestern sought out other defrauded policyholders and offered any compensation. There was evidence that the pension plan stolen from the Sheridans would have been worth approximately $1 million at retirement. In this case, the jury awarded *$800,000 in compensatory damages*, and Northwestern did not raise any issue with that finding in its briefs to the Alabama Supreme Court. Even if the Alabama Supreme Court affirms the full $25,000,000 punitive damages verdict, the sum represents less than four-days' profit for the defendant.

At pages 6-7, the Business Council discusses Alabama wrongful death cases. It is misleading to lump the total of wrongful death verdicts in with "regular" punitive damages in support of an argument that Alabama punitive damages verdicts are excessive. Alabama has a uniquely "punitive damages only" wrongful death statute. Although denominated "punitive," Alabama wrongful death damages are of a different and unique character. For example, in arriving at the verdict the jury is allowed to take into account the fact *a* human life has been taken (but not the specific value of the particular victim). *Atkins v. Lee*, 603 So.2d 937, 942 (Ala. 1992). For federal income tax purposes, Alabama wrongful death damages are treated as untaxed personal injury damages. *Burford v. United States*, 642 F.Supp. 635 (N.D. Ala. 1986). Other distinctions are outlined in the dissenting opinion in *Geohagan v. General Motors Corp.*, 291 Ala. 167, 176-83, 279 So.2d 436 (1973).

At page 6, the Business Council cites the wrongful death case of *General Motors Corp. v. Johnston*, 592 So.2d 1054 (Ala. 1992), evidently as an example of an unconstitutionally exces-

sive judgment ($7.5 million). In *Johnston*, a seven-year-old was killed when his grandfather's brand new pick-up truck suddenly stalled and was struck and crushed by a tractor trailer truck. The evidence established GM knew a defective part could cause its vehicle to stall. Nevertheless, GM intentionally concealed the fact from the public because a recall would have cost approximately $42,000,000. An analysis of the "*Haslip* factors," 592 So.2d at 1060-64, easily supports this judgment amount.

B. *The Appendix of Alabama Verdicts Contains Inaccuracies and Is Misleading, e.g., in That the List Includes Verdict Amounts from Cases Tried under Alabama's Unique Wrongful Death Statute.*

Appendix B to the Business Council's brief should be treated as no more than what it is: one person's unscientific collection of verdicts. Space does not allow - nor is it necessary to this brief's point — a line-by-line listing of inaccuracies in the appendix. Suffice it to say there are several. And, as partially admitted by the Business Council, the appendix does not disclose the amounts actually paid, if any, in these cases. Even where the appendix states the case was reversed, or new trial ordered, the total of the original verdict is used to bolster the argument of excessiveness. Many of the appended verdicts were compensatory damages. Thus, the list, and the figures, are untrustworthy.

Following is a list of a few of the errors in Appendix B:

(1) The following cases, as evidenced by published Alabama Supreme Court opinions, involve *only compensatory damages*, and no punitive damages at all: *Pacifico v. Jackson*, 562 So.2d 174 (Ala. 1990) (p. 12a of Appendix B); *Alabama Power Co. v. Foster*, 555 So.2d 174 (Ala. 1989) (p. 16a); *Ensor v. Wilson*, 519 So.2d 1244 (Ala. 1987) (p. 20a); and *Davison v. Mobile Infirmary*, 456 So.2d 14 (Ala. 1984), and 518 So.2d 675 (Ala. 1986) (p. 22a). Thus, there is absolutely no excuse for including these $13,150,000 in verdicts in the appendix. Furthermore, the opinion in *Barclay Int'l Inc. v. First Alabama Bank of Montgomery*, 557 So.2d 1201 (Ala. 1989) (p. 15a), indicates the $1,800,000 verdict is all compensatory. The $5,000,000 in *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala. 1987) (p. 20a), appears unlikely to include any punitive award because the Court held plaintiff adequately proved $20 million of lost profits for breach of contract. Many of the unreported verdicts are referred to as medical malpractice cases; it is unlikely these cases involve any punitive damages. Other unreported cases are listed as personal injury — one can speculate they were compensatory verdicts, too.

(2) In *Delchamps v. Morgan*, 601 So.2d 442 (Ala. 1992) (p. 5a) (a $500,000 verdict), the punitive damages count was reversed *and rendered.*

(3) In *Lowery v. Osmond*, (p. 5a), the trial court granted JNOV for the defendant and *the plaintiff* has appealed. Similarly, in *Garner v. City of Opp* (p. 10a), *the plaintiff appealed* from a reduction of the verdict down to $100,000.

(4) In *Harris v. M & S Toyota, Inc.*, 575 So.2d 74 (Ala. 1991) (p. 9a) ($500,000 verdict), the Alabama Supreme Court affirmed the trial court's *granting of defendant's motion for new trial.*

(5) *Alabama Power Co. v. Beam*, 472 So.2d 619 (Ala. 1985) (p. 23a), is a wrongful death case.

(6) *Enstar Group, Inc. v. Grassgreen*, 1993 WL 33533 (M.D. Ala. Feb. 9, 1993) (p. 3a), remitted the punitive award to $10 million.

WITH SUCH BLATANT INACCURACIES, THE ARGUMENTS OF THE BUSINESS COUNCIL OF ALABAMA SHOULD BE DISREGARDED IN THEIR ENTIRETY.

III. THIS COURT'S OPINION IN *HASLIP* ADEQUATELY PROTECTS DEFENDANTS' DUE PROCESS RIGHTS; AND AN ABSOLUTE MATHEMATICAL RATIO "CAP" ON PUNITIVE DAMAGES AMOUNTS WOULD VITIATE THE DETERRENCE AND PUNISHMENT GOALS OF PUNITIVE DAMAGES.

The primary purposes of punitive damages are punishment of the wrongdoer for "outrageous conduct" and "to deter him and others like him from similar conduct in the future." *Restatement of Torts* (Second) §908(1) (1979). *See also*, 1 Linda L. Schlueter and Kenneth R. Redden, *Punitive Damages* §2.2(A)(1), p. 24 (2d ed. 1989). "[T]he jury has the constitutional authority to determine what amount, if any, of punitive damages is necessary to punish a defendant for wrongful conduct and to deter future conduct of a like nature. The common law assigned this function to the jury. *Barry v. Edmunds*, 116 U.S. 550, 5 S.Ct. 501, 29 L.Ed. 729 (1886)." *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878, 884 (Ala. 1991).

This Court has often recognized the historic function of the jury to determine the amount of punitive damages. See, for example, *Molzof v. United States*, 112 S.Ct. 711, 715-16 (1992); and Justice Scalia's concurring opinion in *Haslip*, 111 S.Ct. at 1054. T. Sedgwick, On the Measure of Damages 20 (6th ed. 1874), stated "[t]he measure of damages, being in most cases entirely blended with the questions of fact, must have been from the outset left with the jury."

Being a fact question, the Business Council of Alabama is incorrect to assert the Supreme Court of Alabama errs when it gives some deference to the *fact-finding* of the jury, when considering the factors relevant to punitive damages. This Court's opinion in *Haslip* strikes an appropriate constitutional balance between the due process rights of defendants and the goals of states in allowing punitive damages. The Court also acknowledged the role of the judiciary in reviewing the amount of a verdict (a fact-finding function of the common law jury). This *amicus* vehemently disagrees with the Business Council of Alabama and asserts Alabama courts are

very conscientious in their application of the "*Haslip* factors." The fine print of the Business Council's own appendix evidences many instances of reduced or reversed verdicts.

This *amicus* asserts the Alabama Supreme Court was correct in *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 377-78 (Ala. 1989):

> The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit. We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case. Discretion tolerates elasticity, but the jury's discretion is by no means unbridled. The "whims" of any given jury are still harnessed by the authority of the trial court and appellate courts.
>
> Could a convicted criminal argue a due process violation just because a jury in a neighboring county had recently acquitted an accused on virtually indistinguishable facts?

The Business Council of Alabama advocates the very type of "mathematical bright line" rejected by the majority opinion in *Haslip*. 111 S.Ct. at 1043. It is perfectly obvious why business would advocate such a "cap:" a ratio rule would allow potential defendants to calculate their exposure in advance, and to factor it in to the costs of doing business. Any such ratio "cap" would greatly diminish the punishment and deterrence purposes of punitive damages. "The threat of a punitive verdict that corporate planners cannot calculate with precision is a powerful incentive for corporations to avoid deliberate or reckless misconduct in violation of the state's substantive law. To impose limits on punitive damages would allow corporations to treat them as another cost of doing business." Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L. J. 303, 326 (1991).

This Court's opinion in *Molzof v. United States*, 112 S.Ct. 711 (1992), stresses the primary focus on punitive damages is upon the conduct of the defendant rather than the amount of compensatory damages proved by the plaintiff. The Court said:

> "[A] jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181 (1852). . . .
>
> "By definition, punitive damages are based upon the degree of the defendant's culpability." [citations omitted]. The common law definition of "punitive damages" focuses on the nature of the defendant's conduct.

112 S.Ct. at 715-16.

On remand from this Court, the Supreme Court of Georgia correctly reasoned: "Because deterrence is based on factors other than the actual harm caused, we rejected the notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury." *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501, 502-03 (1991). The Supreme Court of Alabama has also noted, "[t]he essential purpose of punitive damages would be thwarted if we required that they conform to any mathematical equation." *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So.2d 191, 199 (Ala. 1992). In another case, that Court further explained:

> A constitutionally permissible punitive damages award against a wealthy defendant, who engages in egregious conduct that fortuitously does little real harm but has the potential to do great harm, might involve a greater ratio of punitive damages to compensatory damages than that in this case. In contrast, a constitutionally permissible punitive damages award against a poor defendant, whose reckless conduct causes great actual harm but has little potential to cause other harm, might require a lower ratio of punitive to compensatory damages than that in this case. We find no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages. Imposing such a relationship would inevitably result in injustices, and we decline to impose it.

Southern Life and Health Ins. Co. v. Turner, 586 So.2d 854, 858 (Ala. 1991). *See also Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1499 (8th Cir. 1992), citing *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988) ("an inflexible ratio that focuses on plaintiff's injury rather than of defendant's wrongdoing fails to accomplish the purpose of punitive damages"); *Crookston v. Fire Insurance Exchange*, 871 P.2d 789 (Utah 1991) (any mathematical cap or ratio defeats the purposes of punitive damages); and *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991).

CONCLUSION

This *amicus curiae*, the Alabama Trial Lawyers Association, urges the Court to affirm the judgment of the Supreme Court of Appeals of West Virginia.

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IN THE

Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER C. GOODE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

[illegible] OF THE WEST VIRGINIA TRIAL LAWYERS [illegible] AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*

With the written consent of the parties, reflected in letters filed with the Clerk pursuant to Rule 37, the West Virginia Trial Lawyers Association submits this brief as *amicus curiae*.

The members of the West Virginia Trial Lawyers Association are aware first-hand of the critical role punitive damages play in advancing important state policies, in West Virginia and elsewhere. Represented here by law professors who have published important "law and economics" articles analyzing punitive damages, the members of the Association are familiar with the legal foundation of such damages, especially the deterrence rationale articulated by Justice Richard Neely of the West Virginia Supreme Court in the decision below.

Petitioner TXO Production Corp. has mischaracterized the deterrence rationale underlying the award of punitive damages in this case. That rationale does not predict that in all cases "optimal" deterrence will be achieved simply by requiring a defendant to pay a plaintiff's out-of-pocket losses. To the contrary, the determination of optimal deterrence requires consideration of three principal factors: (1) the magnitude of the wrongdoer's expected gain; (2) the social cost of the kind of activity in which the wrongdoer has engaged; and (3) the probability that the wrongdoer might escape detection or punishment. Merely making a plaintiff whole *ex post*, as TXO proposes to do, will produce underdeterrence in some, if not many, cases for reasons discussed further herein.

In particular, a defendant like TXO that engages in conduct likely to produce both large private profit and great social cost, but whose attempt to implement its scheme and realize its anticipated gain fails because of the vigilance of the intended victim, should not be permitted to limit its damages to the meager out-of-pocket costs expended by the victim in the course of the latter's preventive action. Such a limitation would be truly perverse, as it would allow an intentional tortfeasor to realize large profits if its scheme succeeded and to pay only minimal damages if its plan was thwarted — a judicial version of "heads I win, tails you lose." An arsonist whose plans are foiled by the actions of a quick-thinking homeowner in dousing the flames should not have her punishment limited to the cost of a new fire extinguisher.

SUMMARY OF THE ARGUMENT

The argument in TXO's brief regarding "rational" or "optimal" deterrence contains a number of basic economic mistakes. In particular, the following claims are inaccurate or accurate only under certain specialized conditions not disclosed in TXO's brief and, more importantly, not present in this case:

- TXO contends that punitive damages are needed only to account for the probability that wrongdoing will go undetected and that, "[i]f every tort were detected and penalized, no punitive award would be necessary to further the State's deterrence goal." Brief of Petitioner ("Pet. Br.") 28-29.
- TXO maintains that a defendant's gain can be no more than a plaintiff's loss, and that, "[a]ccordingly, assessing a damage award that fully recovers the actual harm to the party whose title has been slandered would have the effect of removing *all* gains from the wrongful activity, effectively deterring that activity." Pet. Br. 28.
- TXO asserts that "there are substantial social costs associated with overdeterrence" of intentional torts, and therefore "a rational application of deterrence theory produces a punitive award just sufficient to persuade individuals not to engage in activity that the State condemns." Pet. Br. 28 & n.26.

Each of these propositions is fallacious or, at minimum, quite misleading as stated. Although *amicus* does not argue that the Constitution enshrines the deterrence-based theory of punitive damages that formed an important basis of Justice Neely's opinion below, *amicus* most certainly disagrees with the contrary proposition advanced by TXO — that is, that the Constitution somehow forbids a State from basing its tort law on that theory. Just as the Constitution does not enact Mr. Spencer's *Social Statics*, *see Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), neither does it embody TXO's peculiar brand of economics.

I. TXO undermined the method of contractual exchange, on which our free enterprise system rests, by pursuing an extortionate scheme to obtain a greater royalty interest through unlawful and fraudulent means, rather than through socially approved bargaining mechanisms. Punitive damages are necessary in a case like this in order to deter defendants from bypassing legitimate methods of contractual exchange. Defendants should be forced to negotiate in good faith for assets and should not be permitted to obtain them through blackmail or extortion. Awarding a plaintiff compensatory damages alone will not produce adequate deterrence, because a defendant's circumvention of the negotiation process (an extortionate "taking") in a "thin" market permits a defendant to capture all the gains from exchange that would have been divided between the parties under a scenario of negotiation. Punitive damages must be used to deter defendants from engaging in "contractual bypass" and similar strategic opportunism. The harms of such misconduct are not limited to plaintiffs who bring suit, but ripple throughout the economy as a whole and result in lost efficiencies and underutilization of resources. Punitive damages should be set at least equal to a defendant's expected gain. It is impossible to "overdeter" attempts at contractual bypass; the optimal level of such activity is zero.

II. Furthermore, the reason that respondent Alliance Resources Corp. did not suffer greater out-of-pocket losses in this case was that Alliance refused to succumb to TXO's extortion. But this does not provide an argument against punitive damages. Alliance should not be penalized for its vigilance or refusal to give in to TXO's threats; rather, TXO should be penalized for the profits it expected to realize and the social harm threatened by its misconduct. Thus, the absence of significant compensatory damages in this case *increases*, not *decreases*, the justification for punitive damages. Compensatory damages alone would fail to provide sufficient deterrence in this and many other intentional tort cases, and a State should be free to impose an ostensibly "disproportionate" amount of punitive damages in order to achieve adequate deterrence.

III. Punitive damages are also warranted in cases of intentional wrongdoing in order to remove a defendant's illicit gains from socially prohibited conduct. Compensatory damages alone do not ensure that this objective is met.

IV. TXO's concerns about the potential for legal error are misplaced. The possibility that judges will err in adjudicating intentional tort cases is small, and the limits of judicial competence in fact militate in *favor* of imposing punitive damages in instances of deliberate "contractual bypass" like the case at bar.

In sum, there is good reason not to impose any requirement that punitive damages bear a particular numerical relationship to compensatory damages. The traditional purpose of punitive damages is deterrence and punishment. If the expected gain or potential social harm of the defendants' conduct is large but compensatory damages are small — because the defendant's scheme is unsuccessful, for example — then punitive damages should be high. It is precisely in such situations, of course, that the arithmetic ratio between punitive and compensatory damages will be dramatic. Thus, the existence of a stark discrepancy between punitive damages and a plaintiff's out-of-pocket loss — like the alleged 526:1 ratio in the instant case — should not be a matter of constitutional concern.

Indeed, some of TXO's *amici* explicitly recognize that a plaintiff's out-of-pocket loss cannot provide the sole basis for computing the rationality of punitive damages. *See* Brief of the American Tort Reform Association, et al., as *Amici Curiae* in Support of Petitioner, at 15 ("where the injury is slight or only nominal, basing the penalty on the amount of compensatory damages is likely to be inadequate to provide appropriate punishment and deterrence"). Other *amici* acknowledge "the inherent arbitrariness" of any mathematical ratio requirement between compensatory and punitive damages. Brief of Arthur Andersen & Co., et al., as *Amici Curiae* in Support of Petitioner, at 13 (contending that "it would be sheer fortuity if punitive damages awards that were determined only by reference to some multiple of compensatory damages resulted in rational awards").

ARGUMENT

TXO is flatly wrong in suggesting that the only considerations germane to rational deterrence are the compensable harm suffered by the plaintiff and the probability of enforcement. There are at least three reasons that merely compensating a plaintiff for its loss will not guarantee adequate deterrence in a case like this one. A State should therefore be free to impose additional punishment in the form of punitive damages.

I. PUNITIVE DAMAGES ARE NEEDED TO PREVENT CALCULATED MISCONDUCT BY DEFENDANTS

A. Providing Compensatory Damages Alone Creates Perverse Incentives in "Thin" Markets

This case involves an attempt by TXO to subvert a system of contract. TXO used a fabricated cloud on respondents' title in an attempt to take a greater share of royalties than the parties had agreed to in voluntary negotiations. In the words of the West Virginia Supreme Court, TXO "knowingly and intentionally brought a frivolous declaratory judgment action against [respondents] to clear a purported cloud on the title. TXO's real intent, however, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease." *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 875 (W. Va. 1992). "[I]nstead of clearing the title directly by making the grantee of the quitclaim Tug Fork or approaching the [respondents] to discuss the title problem, TXO attempted to use the purported cloud as leverage for increasing its interest in the oil and gas rights." *Id.* at 877. In short, TXO committed the oil-and-gas analog of extortion.

The system of contract that TXO repudiated is the foundation of our economic order. In a world of rational economic actors, voluntary transactions produce outcomes that make both parties

better off and thus lead to increased social welfare.[1] A system of voluntary contractual exchange encourages mutual consensual decisions made on the basis of the parties' subjective valuations, producing more efficient outcomes for society overall than would a system operating by command. *See Harris v. Crowder*, 322 S.E.2d 854, 860 (W. Va. 1984) (Neely, J.) (noting benefits of free enterprise system).

Under a regime of purely compensatory damages, however, a defendant like TXO will have an incentive to engage in what economists term "strategic" behavior: if the defendant extorts or takes an asset from a plaintiff, and is required after the fact to pay only compensatory damages, the defendant will retain all the gains from exchange that would have been divided between the parties had they freely negotiated over the sale of the asset.[2] Damages that "compensate [a plaintiff] in a legal sense . . . are undercompensatory in a larger sense. They do not restore [the plaintiff's] preexisting opportunities for obtaining exchange values — opportunities for a share of any gains from exchange. The now impossible trade would have made [the plaintiff] more than whole." Haddock, McChesney, & Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1, 16 (1990).

By awarding only compensatory damages, courts facilitate contractual bypass in "thin" markets like those for oil and gas

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[1] Such outcomes are called "Pareto efficient." *See* A. M. Polinsky, *An Introduction to Law and Economics* 7 n.4 (2d ed. 1989) ("A situation can be said to be Pareto efficient or Pareto optimal if there is no change from that situation that can make someone better off without making someone else worse off. Equivalently, if a situation is *not* efficient in this sense, then, by definition, someone *can* be made better off without making anyone else worse off.") (emphasis in original).

[2] This point is illustrated in an "Edgeworth box" analysis in Haddock, McChesney, & Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Calif. L. Rev. 1, 13-19 (1990), which is not reprinted here. *See also* Rose-Ackerman, *I'd Rather Be Liable Than You: A Note on Property Rules and Liability Rules*, 6 Int'l Rev. L. & Econ. 255, 259 (1986) (because defendants obtain all gains from trade if they are required to pay only compensatory damages, they will prefer paying damages over bargaining).

development, where assets are not homogeneous and for which there is no standard price quotation.[3] Each tract of land is unique, with its value dependent on a complex mix of information, risk aversion, technology, relative prices of other forms of energy, and other variables. All exchanges are negotiated, and it would be virtually impossible and extraordinarily expensive for a court to determine the content of a contractual bargain after the fact. Haddock, McChesney, & Spiegel, *supra*, at 21-22.

By imposing punitive damages at least equal to a defendant's expected gains, the court is relieved "of the valuation problems inherent in setting damages in a thin-market taking and also is able to protect [the plaintiff's] expectations concerning his investment." Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 310 (1991).[4] Thus, States must be permitted to set punitive damages according to defendants' *ex ante* expected gains. TXO's attempt to link the permissible limits on punitive awards to plaintiffs' out-of-pocket damages relies on incorrect assumptions:

> [I]f legal remedies always imposed ordinary damages, as in the standard liability model, incentives would exist for defendants to forego consensual exchange in favor of socially costly takings — "contractual bypass," so to speak. To discourage such takings, a legal remedy must leave a defendant

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[3] "A thin-market asset need not be rare or priceless; rather, the key attribute of a thin-market asset is that its owner is unable to find a ready replacement at a definite standard price." Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 309-10 (1991). Examples include land, skilled labor, and controlling blocks of corporate stock.

[4] *See also* R. Posner, *Economic Analysis of Law* 209-10 (4th ed. 1992); W. Landes & R. Posner, *The Economic Structure of Tort Law* 160-61 (1987); Landes & Posner, *An Economic Theory of Intentional Torts*, 1 Int'l Rev. L. & Econ. 127, 135 (1981); S. Shavell, *Economic Analysis of Accident Law* 148-49 (1987).

> who takes with no advantage vis-a-vis a defendant who bargains. . . . [T]he appropriate remedy for a violation of a property protection . . . is "punitive": it leaves [a defendant] worse off than negotiation would have. Merely compensatory damages are insufficient to discourage takings and encourage negotiation.

Haddock, McChesney, & Spiegel, *supra*, at 18-19.[5]

In this case, TXO's conduct was a classic example of strategic opportunism: it attempted to fabricate a claim of title, culminating in a quitclaim deed, in order to seek a judicial conferral of title upon it. TXO then attempted to use the threat of litigation and the concomitant cost of attorney's fees to browbeat the smaller Alliance into surrendering or reducing its right to the stream of royalties. The West Virginia Supreme Court found that this was not legitimate bargaining but was instead extortion, or "negotiation" at gunpoint. The Court opined that TXO was guilty of a "pattern of fraud, trickery and deceit." 419 S.E.2d at 890.

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[5] "Because the contractual bypass is a phenomenon that society wants to *eradicate*, it will not be enough to impose compensatory damages which merely make [the] plaintiff whole *ex post*. Punitive damages also must be imposed in an amount calculated to extract the profit [the defendant] expected to gain from his taking . . . . With such a rule, potential [defendants] will be deterred completely from bypassing the negotiating process, because the contractual bypass will never improve their situation and can only worsen it." Toy, *supra*, at 307-08. *See also* R. Posner, *Economic Analysis of Law* 220 (4th ed. 1992) ("[T]he proper sanction for a pure coercive transfer such as theft is something greater than the law's estimate of the victim's loss — the extra something being designed to confine transfers to the market whenever market-transaction costs are not prohibitive. We can be more precise: The extra something should be the difference between the victim's loss and the offender's gain, and then some."); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 866, 874, 888 (1989) (proposing "gain-based" method of assessing punitive damages).

B. Providing Compensatory Damages Alone Leads to Social Deadweight Losses

The need for full deterrence is underscored by the fact that the harmful effects of such strategic behavior are not limited to the victims from whom assets are taken; instead, it diminishes the incentive of all potential market participants to invest in tradeable assets. "Furthermore, substitute investments less threatened by opportunistic takings will be enlarged, even where such investments are socially less valuable at the margin than the foregone alternatives."[6] In addition, potential victims and wrongdoers will expend resources in trying, respectively, to prevent and to effect the improper transfer of the good or asset in question — expenditures which are a deadweight social loss.[7]

Attempts at market-bypassing behavior weaken the system of consensual commercial exchange and private property ownership on which the free enterprise system rests.[8] A State has a great

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[6] Haddock, McChesney, and Spiegel, *supra*, at 16; *see also id.* at 17 ("[T]raders as a group will suffer if individuals can strategically substitute court-ordered compensation for negotiation. Liability rules make thin-market entitlements a sort of commons, so that gains that would otherwise be available from exchange instead will be dissipated by searches for and defense of takeable assets, and resources available for investment will be diverted toward less takeable uses."); Toy, *supra*, at 309 ("If [contractual] bypasses are not deterred, [plaintiffs] will be reluctant to invest their wealth and resources because their investment and accompanying expectations of future gain can be taken from them willfully and without adequate compensation. It therefore follows that voluntary transactions are important, not only for individual welfare, but also for society as a whole.").

[7] *See* R. Posner, *Economic Analysis of Law* 208 (4th ed. 1992); Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. Econ. J. 224, 230-31 (1967); McChesney, *Desperately Shunning Science?*, 71 B.U. L. Rev. 281, 284-86 (1991); Shavell, *Individual Precautions to Prevent Theft: Private versus Socially Optimal Behavior*, 11 Int'l Rev. L. & Econ. 123, 123-32 (1991); McChesney, *Boxed In: Economists and Benefits From Crime*, Int'l Rev. L. & Econ. (forthcoming 1993).

[8] *See* McChesney, *Deception, Trademark Infringement, and the Lanham Act: A Property-Rights Reconciliation*, 78 Va. L. Rev. 49, 54 (1992) ("Theft has no net social benefits — any gain to the thief is

interest in preventing what Professors Calabresi and Melamed call "property rules" from being converted into "liability rules."[9] That is, a State has a strong interest in preventing defendants from systematically bypassing the system of market exchange and private property rights by stealing assets, or attempting to steal them, rather than bargaining for them.[10] Indeed, Judge Posner

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essentially a transfer from the victim. At the same time, theft is costly. Resources that could be used to produce new goods and services are devoted instead to taking existing assets from others; owners of those assets must devote resources of their own to guard against theft. In addition, the possibility of having one's assets stolen diminishes the incentive to create them in the first place. . . . [Social control of theft] is not a problem of optimization at the margin. Rather, the law should seek the eradication of the valueless activity altogether."); *Punitive Damages: A Supporting Theory*, 40 Ala. L. Rev. 1227, 1234-35 (1989) ("Engaging in fraud . . . or actively misleading not only produces a need for compensation, it also undermines the foundation of the legal-economic structure in such a way that we cannot even guess the degree to which the system fails to operate efficiently. . . . [F]raud should frequently generate punitive awards.").

[9] *See* Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the form of entitlement is agreed upon by the seller. . . . Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.").

[10] *See* Calabresi and Melamed, *supra*, at 1126:

> Once we reach the conclusion that we will not simply have liability rules, but that often, even just on economic efficiency grounds, property rules are desirable, an answer to the question [of why a thief is not charged with the value of the stolen item] becomes clear. The thief not only harms the victim, he undermines the rules and distinctions of significance beyond the specific case. Thus even if in a given case we can be sure that the value of the item stolen was no more than X dollars, and even if the thief has been caught and is prepared to compensate, we would not be content simply to charge the thief X dollars. Since in the majority of cases we cannot be sure of the economic efficiency of the transfer by theft, we must add to each case an undefinable kicker which represents society's need to keep all property rules from being changed at will into liability rules.

has emphasized that deterring efforts at market bypass is one of the principal aims of criminal law, at whose intersection with tort law punitive damages lie.[11]

This principle is squarely applicable to the case before this Court. By threatening Alliance's property rights, TXO repudiated the system of private ownership that since the days of Blackstone has been recognized as providing necessary incentives

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Of course, in some instances a property interest *can* be taken and only "compensatory" damages paid. A primary example is state eminent domain proceedings, where such a rule is necessary to avoid holdout problems and strategic bargaining by landowners. In this case, however, such concerns are entirely absent; there is every indication that the title's purported ambiguity could have been resolved without extortion and blackmail by TXO. In any event, the "holdout" problem and other concerns are issues of policy, not of constitutional law, and should not be used to invalidate a State's system of punitive damages.

[11] Judge Posner has written that:

> The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange — the "market," explicit or implicit — in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange. Market bypassing in such situations is inefficient — in the sense in which economists equate efficiency with wealth maximization — no matter how much utility it may confer in the offender. Much of this market bypassing cannot be deterred by tort law — that is, by privately enforced damage suits. The optimal damages that would be required for deterrence would so frequently exceed the offender's ability to pay that public enforcement and nonmonetary sanctions such as imprisonment are required.

An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193, 1195 (1985). Of course, in the case of corporate defendants, "imprisonment" is a less practical alternative, and the use of civil punitive penalties to deter market bypassing is a sensible choice: "society could allow whomever the law was intended to protect to sue for punitive damages." *Id.* at 1201. "This means that the criminal law is designed primarily for the nonaffluent; the affluent are kept in line, for the most part, by tort law." *Id.* at 1204-05.

for investment in and efficient use of resources.[12] In concrete terms applicable to this case, oil and gas production would be retarded if owners, investors and producers were uncertain about rights of ownership or were obliged to avail themselves of expensive legal means to safeguard their rights and to ward off transgressors.[13] At the margin, it might be difficult to show a decrease in economic production directly attributable to individual acts of extortion and slander of title, but the same could be said for virtually all intentional torts and criminal episodes. Unless rules protecting lawful property rights are enforced categorically, and unless attempts at converting "property rules" into "liability rules" are punished, society as a whole will suffer.

C. Punitive Damages Should be Set According to a Defendant's Expected Gain, Not a Plaintiff's Out-of-Pocket Loss

The proper referent for the assessment of punitive damages is a defendant's expected gain, not a plaintiff's out-of-pocket loss. This point is conceded by Dean Griswold in a brief *amicus curiae* in support of TXO. He explains that punitive damages should be assessed to "[r]emov[e] the actual *or expected gain*,"

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[12] *See* 2 W. Blackstone, *Commentaries on the Laws of England* 4, 7 (1766); R. Posner, *Economic Analysis of Law* 32 (4th ed. 1992).

[13] *See* R. Hemingway, *The Law of Oil & Gas* 193 (1991) (noting, with respect to "slander of title affecting oil and gas interests," that "[a] disparaging statement about a particular property has a tendency to depreciate its market value through its effect upon the opinions of other people"); G. Morgenthaler, *Oil and Gas Title Examination* 65 (1982) ("[O]il and gas exploration and development is a very expensive business. The damages that could accrue from a failure of title to an oil and gas property developed in ignorance of a title defect are astronomical"); A. Anderson, *Fundamentals of the Petroleum Industry* 116 (1984) ("Any tract of land selected for drilling must be properly located and described. It is essential to know who owns precisely which few square feet, how that person came to have title to it, what is the history of the title, and precisely how the land is located with respect to other lands around it. . . . No oil company wants to sink a great deal of money into a well only to have its lease challenged later . . . .").

on the basis of "[t]he defendant's profits from his misconduct — or, in some cases, *the expected profits where the defendant fails to profit as expected*." Brief *Amici Curiae* for The American Council of Life Insurance, et al., at 15-16 (emphasis added); *see also id.* at 6 ("courts may evaluate the jury's award for excessiveness using the amount of a defendant's actual *or anticipated gain from his misdeeds*") (emphasis added).[14]

Thus, "the proper focus [for assessing punitive damages] is on the expected *ex ante* utility of defendants." Haddock, McChesney, and Spiegel, *supra*, at 18 n.54. Punitive damages should not be reduced simply because TXO's scheme did not succeed, any more than they should be reduced if the Blevins tract turned out to be less valuable than TXO believed at the time of its tortious conduct. Indeed, when actual gain is unexpectedly small, it will often be necessary to *increase* punitive damages, because compensatory damages will likely be small. *See* Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3, 65 (1990). The proper calculation for punitive damages in cases where defendants do *not* achieve their intended objective is discussed further in Part II, *infra*, where we show that a State can rationally punish such cases as severely as it does cases in which defendants actually achieve their ends. At this juncture, however, we simply want to underscore a more basic point: whatever the precise magnitude of a punitive damages award, it must be set with reference to a defendant's expected gain, not to a plaintiff's out-of-pocket loss. TXO's brief ignores this fundamental principle.

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[14] The point is also conceded by former Deputy Solicitor General Frey in a brief filed by the American Tort Reform Association, et al., as *Amici Curiae* in Support of Petitioner: Among the factors relevant to the assessment of punitive damages is "the *anticipated* or actual gain to the defendant" (*id.* at 3) (emphasis added), alternatively phrased as "the actual or *potential gain* to the defendant." *Id.* at 12 (emphasis in original). "[T]he greater the *anticipated gain* from a tort, the greater the penalty needed to provide appropriate disincentives for its commission." *Id.* at 16 (emphasis added); *see also id.* ("the amount that the defendant gain *or reasonably could have expected to gain* from its misconduct") (emphasis added).

D. Concerns About "Overdeterrence" Are Misplaced

Some rights and assets (such as the entitlement to be free from breaches of contract or negligently caused accidents) are protected only by liability rules. A defendant who violates such a rule need pay only ordinary compensatory damages. But this case involves the intentional bypassing of contractual exchange through extortion and fraud — i.e., the conversion of a property rule into a liability rule. *See* Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 818 (1989) (noting that, under "established contract law," breaches of contract are not "absolutely normatively proscribed," as are crimes and intentional torts).

In this case, there should be no concern about "overdeterring" the kind of contractual bypass in which TXO engaged. Even if social welfare would be increased if a particular asset were in the hands of Firm A rather than Firm B, intentional predatory conduct by Firm A to acquire the asset is of no social value so long as the asset can be transferred through legitimate avenues of market exchange. Thus, attempts at contractual bypass "have *no* social value at any level: their optimal level is zero. To eradicate such activities, efficient law would . . . reduce to zero the expected gain available to the defendant from the injurious activity, leaving no incentive for him to attempt the activity in the first place." Haddock, McChesney, & Spiegel, *supra*, at 13; *see also Ackerman v. Schwartz*, 947 F.2d 841, 846-47 (7th Cir. 1991) (Easterbrook, J.) ("The optimal amount of fraud is zero."). "[A]n efficient legal system would try to eradicate property violations, not seek to optimize them." Haddock, McChesney, & Spiegel, *supra*, at 29.

II. PUNITIVE DAMAGES ARE NEEDED TO PUNISH AND DETER DANGEROUS ACTS THAT FORTUITOUSLY CAUSE LITTLE HARM IN THE INDIVIDUAL CASE

This case involves a scheme, carried through to completion, that — purely fortuitously — caused the plaintiff little out-of-pocket loss, although the scheme carried the potential for great social harm. TXO expected to obtain a greater share of royalties through its gambit, but Alliance refused to knuckle under to TXO's extortion. Alliance did not capitulate in the face of the quitclaim deed or the declaratory judgment action, and its rights were ultimately vindicated. Alliance's out-of-pocket losses came to only $19,000 in attorney's fees, although they could of course easily have been much greater. The West Virginia Supreme Court found that "[t]he type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims." 419 S.E.2d at 889 (emphasis in original). The oil-and-gas market is a high-stakes business, *see, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), and it is entirely conceivable that TXO could profit by millions of dollars in the future using similar fraudulent schemes, just as it very nearly succeeded in capturing a substantial stream of royalties here.

Punitive damages are appropriate to deter such misconduct. Indeed, an excellent analogy was provided by one of TXO's *amici*, which recognized the appropriateness of punitive damages far in excess of a compensatory award "where a defendant has engaged in heinous conduct with huge potential for harm, but which resulted in little actual harm (*e.g.*, the defendant throws harmful acid at a person's face, but misses, causing only minimal clothing damage)." Brief of the American Automobile Manufacturers Ass'n, et al., at 23. This argument makes intuitive as well as economic sense.

First, extortionate behavior can itself create deadweight social losses even if the scheme is ultimately unsuccessful. To continue the acid-throwing analogy, such an episode may produce generalized societal fear, cause increased safety precautions, and lead persons to curtail their activities (*e.g.*, by refraining from

going out at night, or by not entering certain parts of a city) — even if the defendant in the acid-throwing incident is eventually apprehended.[15] In the same way, many of the negative effects of the kind of market-bypassing behavior for which punitive damages are awarded — decreased investment, increased precautions in protecting property, and so on — may persist even if attempts ultimately prove unsuccessful.

Second, punishing torts even where no harm is done increases deterrence. A defendant who knows that it will escape all but nominal punishment if its unlawful scheme does not cause the plaintiff appreciable harm has a greater incentive to embark on such a venture than a defendant who knows that it will be punished regardless of the outcome. A useful analogy is the punishment of attempts in criminal law, where punishing a criminal even if he is apprehended before he can complete the crime "increases the expected costs" of the crime to him: "[h]e cannot be certain that his attempt will succeed, and if it fails he will not merely forgo the gains from a successful [crime] but will incur additional (punishment) costs." R. Posner, *Economic Analysis of Law* 233 (4th ed. 1992). "Since Jeremy Bentham, and probably before, punishing attempts has been regarded as a means of supplementing deterrence of undesirable behavior."[16]

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[15] *See, e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 28 (1982); *Reality and Anxiety: Crime and the Fear of It*, N.Y. Times, Feb. 18, 1993, at A14 ("[F]or millions of Americans, the fear of crime may well be outpacing its growth. In increasing numbers, . . . Americans are arming themselves with an array of weapons, devices and gadgets intended to thwart criminals. . . . [M]illions of people are expressing a growing sense of vulnerability in ways large and small.").

[16] Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Leg. Stud. 435, 437 (1990). "[P]unishment of attempts increases deterrence by raising the *probability* of imposing sanctions. Those who would shoot at another person will realize that they may be penalized if they miss as well as if they succeed; those contemplating engaging in theft will understand that they will suffer sanctions if they are apprehended trying to carry out theft as well as if they are caught red-handed with stolen goods. Punishing attempts thus increases deterrence by expanding the set of circumstances in which sanctions are imposed." *Id.* at 436.

Here, of course, TXO actually completed its scheme, failing to achieve its ultimate objective only because of Alliance's vigilance. But the analogy of punishing attempts nonetheless illustrates the role of punitive damages in enhancing deterrence in the present context.

States can choose from a number of possible rational approaches in addressing the problem of defendants who do not achieve their intended gain but are nonetheless detected and brought to justice. It is certainly rational to punish such defendants *as if* they had succeeded in realizing their illicit objective, as a simple numerical example illustrates. In general, the expected value of wrongdoing is equal to the monetary value the defendant will receive if the wrongdoing is successful[17] and if the defendant escapes detection,[18] multiplied by the *probability* that the defendant will both succeed and escape detection. For example, if a defendant expects an ultimate profit of $10 million, and the wrongdoing has an 80 percent probability of success and a 90 percent probability of avoiding detection and punishment, then the expected value is $7.2 million.[19] These two variables — success and detection — produce four kinds of defendants: (1) those whose wrongdoing succeeds and who go undetected ("successful undetected"); (2) those whose wrongdoing does not succeed but who are not detected ("unsuccessful undetected"); (3) those whose wrongdoing is successful but who are eventually detected ("successful detected"); and (4) those whose wrongdoing does not succeed and who are also detected ("unsuccessful detected").

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[17] By "success," we mean that the wrongdoing will, at least initially, achieve its intended effect.

[18] "Detection," quite apart from success, refers to the probability that the intended victim (or others) will discover the wrongdoing and act to enforce legal sanctions against it.

[19] This example is of course an oversimplification, since, for example, success may increase the probability of detection (i.e., the probabilities of success and detection may not be independent of one another), but the example suffices for present purposes.

Suppose that 50 percent of a given type of wrongdoing succeeds and 50 percent is detected. Then, if the payoff for an undetected, successful instance of such wrongdoing is $10 million, a defendant's *ex ante* expected value is $2.5 million. In order to deter both successful and unsuccessful wrongdoing, society must ensure that *all* defendants face an expected *ex ante* penalty of at least $2.5 million. Society can rationally choose from any of several approaches to arrive at this expected penalty of $2.5 million. For example, society could impose penalties only upon "successful detected" defendants; in order to deter all of this particular kind of wrongdoing, society would have to impose a penalty of at least $10 million on each such defendant (after first removing the $10 million in ill-gotten gains). Alternatively, however, society could elect simply to punish all defendants who are detected, regardless of whether they have been successful (after first removing, of course, the gains of those who happened to succeed). Under this approach, society could levy a punitive damages award of at least $5 million on both "successful detected" and "unsuccessful detected" defendants. The award on a per-defendant basis would be lower than if only "successful detected" defendants were punished, but the overall deterrent effect would be exactly the same because the expected penalty faced *ex ante* by all defendants is the same under both systems. In short, punishing all detected defendants, and punishing them without regard to their level of success, produces a rational system of deterrence.

Third, restricting plaintiffs' awards to compensatory damages and not punishing defendants' attempts that pose a great risk of harm (but in fact result in minimal losses) creates perverse incentives for defendants. Under such a regime, a defendant — even assuming that its gain is no more than a plaintiff's compensable loss — has the incentive to commit a tort where its expected gain (that is, the gross value discounted by the probability of detection and punishment) is greater than the defendant's net worth. If the defendant's attempt is unsuccessful, under the "compensatory only" regime it pays little in damages *whether or not it is detected*; if it succeeds and is not detected, it realizes the full value of the tort; if it succeeds but is detected,

its punishment can be no greater than its net worth. This string of possibilities will lead to a systematic and inefficient bias in favor of the tort's commission. In cases involving intentional torts with large potential payoffs, it is easy to imagine that the limits of defendants' net worth will be approached.[20] Awarding punitive damages in cases where an act fails to do significant harm to a plaintiff solves this problem.

For all these reasons, limiting TXO's punishment to Alliance's out-of-pocket loss would produce insufficient deterrence.[21] Indeed, "the sanction for an attempt need not be less than that for an identical act that results in harm." Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Leg. Stud. 435, 437 (1990); *see also* Becker, *Criminal Attempts and the Theory of the Law of Crimes*, 3 Phil. & Pub. Aff. 262 (1974). The classic statement of this argument remains Professor Clarence Morris' trenchant observations of 62 years ago, which are worth quoting at length:

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[20] To continue the terminology of the previous section: if the probability of success for a certain class of intentional torts is 80 percent, the probability of detection only 10 percent, and the ultimate payoff $25 million, then the expected value of the wrongdoing is $18 million. But if courts can punish only "successful detected" defendants, then to achieve an expected penalty of $18 million on *all* defendants courts need to impose an actual penalty of $225 million on the 8 percent of all defendants who are both successful and detected. This sum might approach or exceed the net worth of many potential wrongdoers. Thus, under a "compensatory only" regime for "unsuccessful detected" defendants, the likelihood of inadequate deterrence would be quite real.

[21] *See, e.g.*, Mallor & Roberts, *Punitive Damages: Toward A Principled Approach*, 31 Hastings L.J. 639, 667 (1980) ("Punitive damages should bear a reasonable relationship to the harm that is *likely* to occur from the defendant's conduct, as well as to the harm that *actually* has occurred . . . . [T]he severity of harm, actual and threatened, is one factor that a court should consider in assessing punitive damages.") (emphasis added); Shavell, *Deterrence and the Punishment of Attempts*, 19 J. Leg. Stud. 435, 440 (1990) ("[I]t is desirable for the expected sanction for an act to equal the expected harm caused by the act . . . . [T]he expected sanction should be higher the higher the probability of harm or its magnitude is.").

The damage which the defendant *actually does* may have little or no relation to the size of the money judgment which would be the most effective admonition for the particular case. Of course, it is more important to forestall conduct which is *likely* to cause serious injury than it is to forestall conduct which is *likely* to cause only inconsequential damage. The probable result of a defendant's behavior is an important consideration in determining whether it is desirable to discourage such behavior in the future; the probable result is the measure of the "seriousness" of his wrong. *The actual result may have no bearing on this question. For example, the grossly negligent hunter may shoot into a crowd of people and only break a ten-dollar pair of eye glasses. The admonition meted out to him should be the same as though he had killed or injured someone.* . . . In other words, it is the known tendency of acts which makes it desirable to prevent them, *regardless of the particular results of any one commission.*

* * *

> When an act with a vicious tendency happens to result in a small injury the "compensatory" damages are necessarily small. If it must follow that the punitive damages must also be small, the total verdict might be lenient where severity is desirable. . . . So *the ratio test seems to be an impediment in many cases, rather than a good legal tool. If it has any effect at all, it may limit punitive damage awards when they should be severe*, and result in heavy punitive damages when they should be lenient.

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1181-82 (1931) (emphases added). Justice Neely himself relied upon Professor Morris' analysis in his opinion for the Court in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991):

> Punitive damages are necessary when compensatory damages are not large enough to convince a defendant or future defendants to take precautions against similar problems. For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.

Id. at 901-902.

III. PUNITIVE DAMAGES ARE NEEDED TO OVERCOME A DEFENDANT'S "ILLICIT UTILITY"

A final reason that compensatory damages alone are inadequate is that the benefits obtained by a defendant from intentional wrongdoing can, as a normative matter, be recognized as illegitimate. Society can decide not to include such "illicit" gains as part of its calculus of whether to permit the defendant's activity. *See, e.g.*, S. Shavell, *Economic Analysis of Accident Law* 146-47 (1987). Punitive damages are necessary to combat intentional wrongdoing like the sort of misconduct that the West Virginia Supreme Court found to have occurred in this case, because such behavior is "far worse morally" than the mere negligence for which ordinary compensatory damages are typically awarded. R. Cooter & T. Ulen, *Law and Economics* 338 (1988).[22] This also provides another reason why concerns

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[22] *See also* Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1525 n.27, 1549 n.58 (1985) ("illegitimate benefits or costs" should "receive no social weight"); Cooter, *Economic Analysis of Punitive Damages*, 56 S. Cal. L. Rev. 79, 89 (1982) ("the amount of money awarded in punitive damages will usually be large, because the illicit benefit or extraordinary cost of gross fault is large"); Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It*, 101 Yale L.J. 1875, 1883 n.28 (1992) ("Most theorists recognize that some

about overdeterrence are misplaced (*see* Part I-D, *supra*); if intentional torts produce no socially cognizable utility, reducing them does not make society worse off.

Thus, a State should not be barred by the due process clause from "overdeterring" deliberate misconduct on the asserted ground that the Constitution somehow *requires* the State to consider the utility derived by the defendant from the wrongdoing. That is, a State is not required to limit its punishment of thieves and other intentional wrongdoers to only those amounts "just sufficient to persuade [them] not to engage in the activity that the State condemns." Pet. Br. 28. A State should be free to decide, for example, that dangerous criminals or other intentional wrongdoers should be more than just slightly indifferent to embarking on a crime spree. Such a policy requires that damages awarded be greater than the actual loss suffered by the plaintiff or the actual gain realized by the defendant.

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forms of pleasure or utility may be illicit and should be subject to total deterrence"); Dau-Schmidt, *An Economic Analysis of the Criminal Law as Preference Shaping Policy*, 1990 Duke L.J. 1, 12-13; Lewin & Trumbull, *The Social Value of Crime?*, 10 Int'l Rev. L. & Econ. 271, 278 (1990) ("the exclusion of criminal gains [from the social calculus] is mandated by the fundamental premises underlying welfare economics and cost-benefit analysis"); R. Posner, *Economic Analysis of Law* 232 (4th ed. 1992) ("the utility of the criminal act to the criminal is to be ignored"); S.E. Rhoads, *The Economist's View of the World: Government, Markets, & Public Policy* 173 (1985); Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 Wis. L. Rev. 799, 807 ("the rapist's pleasure, since it is fundamentally illicit, should not be given any weight at all"); *cf.* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 77 (1982) (punitive damages can improve efficiency "where harm is deliberately caused and the satisfaction obtained by the actor is 'illicit'").

For an argument for the same conclusion from familiar economic principles, *see* McChesney, *Desperately Shunning Science?*, 71 B.U. L. Rev. 281, 284-86 (1991); McChesney, *Boxed In: Economists and Benefits From Crime*, Int'l Rev. L. & Econ. (forthcoming 1993).

IV. CONCERNS ABOUT LEGAL ERROR REGARDING INTENTIONAL TORTS ARE MISPLACED

Opponents of punitive damages argue that the possibility of legal error — *i.e.*, the risk that a defendant might be found liable for punitive damages by a jury and the verdict sustained by the trial court and by appellate courts, even though the defendant is in some sense "innocent" of such damages — should caution against the imposition of punitive damages. Although the risk of such a mistake is always present in the judicial system, it is relatively small in the context of punitive damages imposed for *intentional* torts. The effects of legal error are most commonly analyzed in negligence cases, where a court must assess a party's true level of care, a party's *momentary* level of care (for example, whether a driver experienced sudden glare, a sneeze, or a lapse of attention at the instant of an accident), and the level of due care required by the law in a particular circumstance.[23] These sources of uncertainly are less pronounced or absent altogether in intentional tort cases, where the legal level of care (i.e., complete abstinence from intentionally tortious activity) is defined in advance, and where a defendant faces "a pure either/or choice rather than a continuous range of choices with the optimum falling somewhere in the middle." Calfee & Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va. L. Rev. 965, 996 (1984).[24] "If there are

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[23] *See, e.g.*, S. Shavell, *Economic Analysis of Accident Law* 79-83 (1987); Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 Colum. L. Rev. 1385, 1411-12 (1987).

[24] *See also* Landes & Posner, *An Economic Theory of Intentional Torts*, 1 Int'l Rev. L. & Econ. 127, 136 (1981) (probability of error is small in cases of intentional torts); Cooter, *Economic Analysis of Punitive Damages*, 56 S. Cal. L. Rev. 79, 79, (1982) ("The situation is analogous to the historical conflict between France and Germany in which armies did not cross the Rhine merely to occupy the far bank. . . . Unintentional fault usually involves a moderate degree of noncompliance, whereas intentional fault usually involves gross noncompliance. Intentional fault is gross because a person who deliberately exposes himself to liability crosses a threshold, after which aggravation of the fault is less costly.").

only two choices, and the choice of committing the act has been prohibited by society, then the other choice must be the social optimum. Defendants can either exactly comply with the optimum by not committing the act, or undercomply by committing the undesirable act, but overcompliance is impossible." Calfee & Craswell, *supra*, at 996 n.70; *see also* R. Posner, *Economic Analysis of Law* 209 (4th ed. 1992) (other reasons that overdeterrence is not a problem with intentional torts).

Furthermore, in intentional tort cases, punitive damages are available only if a plaintiff can prove not only that a defendant has committed an underlying offense, but also that the defendant has acted with the necessary malicious intent to make punitive damages appropriate. In this context, there is no reason *a priori* to expect a systematic bias in awards against defendants. If some defendants might be erroneously found liable for punitive damages, many others might be erroneously exonerated from liability.

More fundamentally, the mere possibility of judicial error is not an argument against punitive damages when a defendant has bypassed contractual systems of exchange, as is in the case here. Precisely *because* a court cannot know the subjective preferences of the parties and the content of the bargain they would have reached, it should impose punitive damages to deter defendants from circumventing contractual transactions. Court error, in other words, militates in *favor* of imposing punitive damages in instances of contractual bypass. *See* Haddock, McChesney, & Spiegel, *supra*, at 25.

CONCLUSION

The deterrence rationale articulated by the West Virginia Supreme Court was well founded in economic theory and human experience. TXO's attacks on that rationale reflect basic economic misconceptions and errors. The judgment should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,

Petitioner,

—v.—

ALLIANCE RESOURCES CORP., THE TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF THE SECURITIES INDUSTRIES ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-479

TXO PRODUCTION CORP.,

Petitioner,

—v.—

ALLIANCE RESOURCES CORP., THE TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

BRIEF OF THE SECURITIES INDUSTRIES ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

PRELIMINARY STATEMENT

The Securities Industries Association, Inc. ("SIA"), submits this brief as *amicus curiae* in support of the petitioner and urges this Court to reverse the opinion and judgment of the Supreme Court of Appeals of West Virginia below in *TXO Production Corp.* v. *Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Pursuant to Rule 37.3 of the Rules of this Court, the written consent of petitioner TXO Production Corp. and of respondents Alliance Resources Corp., The Tug Fork Land Company, George King, and Grover C. Goode

has been obtained and has been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

SIA is the principal trade association of the securities industry, having as members more than 650 securities firms in the United States and Canada. As such, it has a substantial interest in ensuring that any award of punitive damages be the product of fair and impartial rules and proceedings, as is embodied in the concept of due process of law under the Fifth and Fourteenth Amendments to United States Constitution. Many of SIA's members are involved in litigation in which punitive damages are sought. The outcome of this case will have a direct bearing upon whether those claims will be adjudicated impartially and under objective standards or whether those claims will continue to offer an opportunity for an economic windfall—an especially unfair outcome in a commercial setting—based on the caprice of a particular fact finder. SIA seeks to clarify the law on this issue—both as to the procedural requirements for the imposition of punitive damages and as to the scope of punitive damages themselves. Clarification of those two issues will better enable lower courts to apply due process in connection with punitive damage claims and give fair notice to litigants, and the general public as well, of the potential liability for conduct that is subject to punitive damages.

SUMMARY OF ARGUMENT

The opinion of the West Virginia Supreme Court of Appeals below, *TXO Production Crop.* v. *Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), upholding in a commercial litigation a punitive damage award of $10 million in comparison with an actual damage award of $19,000, manifests a judicial bias against petitioner and a disregard of due process of law. The opinion below flies in the face of this Court's requirement in *Pacific Mutual Life Insurance Co.* v. *Haslip*, ____ U.S. ____, 111 S. Ct. 1032, 1045-46 (1991), that an award of punitive damages be "not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages," 111 S. Ct. at 1045, and that it reflect "objective criteria." 111 S. Ct. at 1046. The award below demonstrates an utter lack of "fundamental fairness . . . [and] the rationality that is an essential component of that fairness." *Schad* v. *Arizona*, ____ U.S. ____, 111 S. Ct. 2491, 2501 (1991).

In affirming a $10 million award that was 500 times the amount of actual damages, in employing an analysis as to whether the conduct of petitioner was "really stupid" or "really mean," 419 S.E.2d at 887 (a test that two concurring Justices of that court termed "ridiculous," 419 S.E.2d at 896 (McHugh, C.J., concurring)), and in refusing to find any limitation at all in the amount of punitive damages that may be assessed against "really mean" conduct, the West Virginia Supreme Court defied this Court to enforce the rule of *Haslip* while purporting to pay lip service to that case. The decision below also affirmed a summary denial of a motion for judgment notwithstanding the verdict by the trial court and

affirmed the admission of evidence of unrelated "bad acts" of petitioner, irrelevant and prejudicial evidence that can only have served to deprive petitioner of due process. That prejudice was further exacerbated in that the only criterion apparently used to measure the amount of punitive damages was the net worth of petitioner's corporate parent. The analysis and the result below in fact present a stark example of the very danger that this Court warned against in *Haslip*—"punitive damages that 'run wild.' " 111 S. Ct. at 1043. This Court should accordingly leave no room for trifling with the requirements of due process in connection with claims for punitive damages by setting forth in clear and unmistakable terms what due process requires.

POINT I

THE DECISION BELOW DEPRIVED PETITIONER OF DUE PROCESS OF LAW

Because the award of punitive damages below as affirmed by the West Virginia Supreme Court manifestly failed to apply due process of law as required by the Constitution, that decision should be reversed. As applied to acts of criminal punishment, due process reflects the fundamental constitutional policy that any punishment imposed by a state or by the United States be based upon the conduct of a person, not on the basis of the identity of that person. Thus, criminal punishments are required to be set by statute, and a criminal defendant is entitled to numerous procedural safeguards meant to ensure a fair and unbiased trial—such as the right to be informed of criminal charges, the right to be indicted by a grand jury, the right to conviction on the

basis a unanimous jury verdict based on evidence beyond a reasonable doubt. As Justice Black observed in holding *ex parte* judicial contempt proceedings unconstitutional in *In re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

349 U.S. at 136.[1]

As this Court recognized in *Pacific Mutual Life Insurance Co.* v. *Haslip*, ____ U.S. ____, 111 S. Ct. 1032 (1991), the concept of due process applies to claims for punitive damages and requires that any award of punitive damages manifest that it was based on "objective criteria." 111 S. Ct. at 1046.[2] This Court in *Haslip*

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[1] This policy is also reflected in the constitutional prohibitions against bills of attainder and *ex post facto* laws. U.S. Const. Art. 1, §§ 9, 10. As the Court held in *Hurtado* v. *California*, 110 U.S. 516, 535-36 (1884):

> Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but . . . 'the general law . . .' so that 'every citizen shall hold his life, liberty, property and immunities under the protection of the general rules of society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other special, partial and arbitrary exertions of power . . . .

110 U.S. at 535-36.

[2] Although awarded in the context of a civil proceeding, punitive damages constitute an act of punishment by the United States and its courts or of the states and their courts. As the New York Court of Appeals held in prohibiting an award of punitive

affirmed an award by an Alabama jury of punitive damages in an amount of approximately four times the amount of actual damages sustained. 111 S. Ct. at 1037 n.2. The Court noted the detailed "post-trial procedures for scrutinizing punitive awards" in Alabama, 111 S. Ct. at 1044, including the analysis of such factors as the culpability of the conduct involved and also that, under Alabama law, the trial court was required to "reflect in the record the reasons" for its decision on any post-trial motion directed at a punitive damage award. Moreover, under the applicable procedures, the Alabama Supreme Court was required to review an award of punitive damages based on "a comparative analysis" as well as consideration of factors such as the amount of harm caused by the defendant's conduct, the degree of reprehensibility, whether the defendant was subject to criminal sanctions, the profitability of the wrongful conduct to the defendant, and the financial position of the defendant. 111 S. Ct. at 1042. That substantive review on both the trial and appellate level satisfied this Court that "punitive damage awards [in Alabama] are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. As a result, although "the monetary comparisons [between the award of punitive

damages by an arbitrator in *Garrity* v. *Lyle, Stuart, Inc.*, 40 N.Y.2d 354, 359-60, 386 N.Y.S.2d 831, 834 (1976):

> In imposing penal sanctions in private arrangements, a tradition of the rule of law is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State . . . . For centuries, the power to punish has been a monopoly of the State, and not of any private individual . . . . The day is long past since barbaric man achieved redress by private punitive measures.

40 N.Y.2d at 359-60, 386 N.Y.S.2d at 834.

damages and the amount of compensatory damages and out-of-pocket loss] are wide and indeed may be close to the line, the award here did not lack objective criteria." 111 S. Ct. at 1046.[3]

The West Virginia Supreme Court below did not begin to apply due process in the manner required under *Haslip*. In sharp distinction with the Alabama procedures that this Court approved in *Haslip*, the trial court in this case summarily denied petitioner's motion for judgment notwithstanding the verdict. Appendix to Petition for writ of *certiorari* at 72a. The West Virginia Supreme Court, far from engaging in the sober analysis approved by this Court in *Haslip*, manifested undisguised bias against corporations with such observations as "the threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations," 419 S.E.2d at 888, followed by a superficial analysis that displayed the flippancy of that Court towards the notion of affording due process to corporate defendants.[4] Specifically, after noting that "we can distinguish between the 'really mean' punitive damages defendant, and the 'really stupid' punitive damages defendant," 419 S.E.2d at 887, and holding that, for "really stupid" defendants, "the outer limit of punitive damages is *roughly* five to one," 419 S.E.2d at 889 (emphasis in the original), the Supreme

[3] The out-of-pocket loss sustained by the plaintiff in *Haslip* was less than $4,000, 0.5 % of the punitive damages awarded. 111 S. Ct. at 1037 n.2.

[4] The concurring opinion below sought to explain the tone of the majority opinion as "a cavalier attempt to be clever and amusing." 419 S.E.2d at 895 (McHugh, C.J., concurring).

Court of West Virginia refused to set any limitation on the amount of punitive damages in "really mean cases" and held that "even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional . . . . " 419 S.E.2d at 889.

Two further evidentiary errors compounded the prejudice against petitioner. In their effort to paint petitioner as "really mean," the courts below admitted evidence of unrelated "bad acts"—including opinion testimony by an attorney " 'that TXO had violated the rights of . . . hundreds or thousands of other people across the nation . . . ' " based on court documents filed in Oklahoma in an action in which petitioner won a jury verdict. 419 S.E.2d at 882-83. The West Virginia Supreme Court greeted that verdict—and the fact that that verdict disproved the attorney's opinion and rendered the introduction of that opinion into evidence highly prejudicial—with the judicious observation, "Well, even a blind hog finds an acorn now and then." 419 S.E.2d at 884 n.9.

Moreover, the courts below admitted expert testimony that the net worth of petitioner's corporate parent, the TXO division of USX Corporation, was between $2.2 and $2.5 billion into evidence. 419 S.E.2d at 890. That evidence can only have served to inflate the punitive damage award based on prejudice against petitioner. Given the remarks of the West Virginia Supreme Court about large corporations, the award must surely reflect prejudice against large or wealthy corporations, which disproves that petitioner received due process below.[5]

[5] As noted below at 17-19, courts often consider the net worth of a defendant in assessing punitive damages, a fact noted by Justice Brennan in his concurring opinion raising the due process issue in *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 280-82 (1989). Due process requires, however, that a defendant's net worth not be the only factor used to measure punitive damages and that care be taken to avoid the possibility of jury prejudice against a wealthy defendant.

That litigants often try to use a defendant's wealth in order to prejudice a jury against that defendant cannot be ignored. For example, in *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342, 1346 (8th Cir. 1991), an expert witness testified to the jury "as to what size punitive award would comparable to a $2, $100 or $1,000 award against a 'common worker' "—a clear invitation to exercise prejudice against a corporate defendant. The Court in *Laughinghouse* v. *Risser*, 786 F. Supp. 920, 928 (D. Kan. 1992), overruled an objection to a $600,000 award of punitive damages notwithstanding that counsel for the plaintiff had stressed the net worth of the defendant corporation in his remarks to the jury. As noted in Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 146-47 (1986), "juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to 'big business.' The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to protect such defendants against excessive liability is, in context, almost laughable." Due process entitles all parties including large corporations to an impartial hearing.

The refusal below to conduct a serious analysis of the punitive damages issue, the improper introduction of evidence prejudicial to petitioner, and the unmistakable hostility directed against petitioner and large corporations in general cannot stand under *Haslip*. Indeed, the amount of the award below—500 times the actual dam-

ages sustained by the plaintiff—alone should resolve any doubts that the West Virginia courts failed to provide due process to petitioner. If the award in *Haslip* came "close to the line," 111 S. Ct. at 1046, this case has gone far beyond that line.

POINT II

BECAUSE PUNITIVE DAMAGES HAVE "RUN WILD," THIS COURT SHOULD ARTICULATE THE DUE PROCESS REQUIREMENTS FOR PUNITIVE DAMAGE AWARDS

Although extreme, the decision below does not represent an isolated instance of punitive damages "run wild." In light of the substantial number of million dollar punitive damage awards, and the court cases either misreading or disregarding the message of *Haslip*, this Court should set forth the minimum requirements of due process in connection with the imposition of punitive damages.

Both in *Haslip* and in prior opinions, this Court has noted its concerns about punitive damage awards. In *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court rejected a challenge to punitive damages as constituting "excessive fines" in violation of the Eighth Amendment but held open whether punitive damage awards satisfied due process on the ground that that question had not been properly raised. Four Justices of the Court, however, questioned the process of awarding punitive damages and the size and frequency of the awards. Justices Brennan and Marshall noted in a concurring opinion that, "without statutory (or at least common-law) standards for the determination of

how large an award is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." 492 U.S. at 280-82. Justices O'Connor and Stevens in partial dissent observed that "awards of punitive damages are skyrocketing." 492 U.S. at 282-301. *See also Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76-80 (1986) (O'Connor, J., concurring) (application of Due Process Clause to punitive damage awards raises a "serious" question); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

Other courts and commentators have shared those concerns. In *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967), the Second Circuit (Friendly, J.) pointed out the catastrophic potential of unlimited awards of punitive damages in the context of mass-tort litigation. Noting that "If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than $10,000, or both . . . ,'" Judge Friendly expressed "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions . . . can be so administered as to avoid overkill." 378 F.2d at 839. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. at 144-46, in commenting on the frequency of multimillion dollar punitive damage awards, noted thirty-eight punitive damage awards in excess of $1 million in the State of California alone between 1983 and 1985, 72 Va. L. Rev. at 145, and cited an additional sixteen exam-

ples in reported decisions between 1980 and 1986. 72 Va. L. Rev. at 145 n.23.[6] According to Professor Jeffries, such results may "threaten the civil extinction of major business entities [and] . . . 'may fairly raise concern for the future stability of American industry.' " 72 Va. L. Rev. at 146 (quoting Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 6 (1982)).

Notwithstanding this Court's stated concerns about "skyrocketing" punitive damages and punitive damages "run wild," such awards continue. In *Jordan* v. *Clayton Brokerage Co.*, 975 F.2d 539, 542 (8th Cir. 1992), the Eighth Circuit affirmed an award of $400,000 in punitive damages for "churning" a commodities account that had sustained $7,900 in trading losses and paid $5,300 in excessive commissions. In *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991), a jury awarded punitive damages of $50 million over conduct that had caused $600,000 in actual damages, which was remitted by the District Court to $28 million. *Mason* v. *Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, ____ U.S. ____,

[6] The nature of the increase in punitive damages between in the last twenty years is graphically documented in Turner et al., *Punitive Damages Explosion: Fact or Fiction?*, Washington Legal Foundation, Critical Legal Issues, Working Paper Series No. 50 (November 1992), which was filed as a supplemental lodging to the brief of the American Petroleum Institute and the National Association of manufacturers as *amici curiae* in support of the Petition for a writ of *certiorari* herein. According to that study, punitive damage awards against businesses in California, Florida, Illinois, New York, and Texas increased from $1.1 million between 1968 and 1971 to $343 million between 1988 and 1991. As adjusted for inflation, those figures still reflect an 89-fold increase in constant dollars.

112 S. Ct. 1941 (1992), ordered remittitur of punitive damages to $12.5 million from a jury award of $25 million. *Davis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1224-25 (8th Cir. 1990), affirmed a $2 million punitive damage award based upon unauthorized trading by an employee of Merrill Lynch, Pierce, Fenner & Smith, Incorporated, who had been terminated, notwithstanding that Merrill Lynch itself had "acted promptly to mitigate further harm after another customer complained of an improper trade" and that the plaintiff's account had actually made money during the period of the unauthorized trading. *See also Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Ore. App. 1991) (affirming award of $5 million in punitive damages as compared to $700,000 in actual damages);[7] *Commonwealth Lloyd's Insurance Co.* v. *Thomas*, 825 S.W.2d 135 (Tex. App. 1992) (awarding $2 million in punitive damages compared with $708,000 in actual damages); *Brown* v. *Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992) (affirming award of $700,000 in punitive damages in comparison with actual damages of $60,000).

The numerous cases in which courts have stricken or reduced large punitive awards by juries further underscores the need for guidance as to the constitutional limits on the scope of punitive damage awards. *Alexander & Alexander, Inc.* v. *R. Dixon Evander & Associates*, 596 A.2d 687, 88 Md. App. 672 (Md. App. 1991) (vacating $12.5 million damage award (which had been remitted from jury verdict of $40 million)); *Lightning Lube, Inc.* v. *Wilco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992) (order-

[7] The jury awarded actual damages of $919,000, which the court reduced to $700,000 based on the jury finding that the plaintiff was 20% negligent.

ing new trial on evidence as to punitive damages after jury had awarded $50 million in punitive damages); *Tunis Brothers Co.* v. *Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 3034 (1992) (vacating jury award of $4 million in punitive damages (compared to $227,000 in compensatory damages) in case involving termination of auto dealership); *Mosser* v. *Fruehauf Corp.*, 940 F.2d 77 (4th Cir. 1991) (affirming District Court decision to set aside $5.5 million dollar punitive damage award); *Machine Maintenance & Equipment Co.* v. *Cooper Industries*, 661 F. Supp. 1112 (E.D. Mo. 1987) (ordering *remittitur* on punitive damages to $100,000 from $10 million); *Toole* v. *McClintock*, 778 F. Supp. 1543 (M.D. Ala. 1991) (reducing punitive damages to $2 million from jury award of $5 million, in comparison to $350,000 in compensatory damages); *Burke* v. *Deere & Co.*, 780 F. Supp. 1225 ($50 million punitive damages award remitted to $28 million); *Jacobs Manufacturing Co.* v. *Sam Brown Co.*, 792 F. Supp. 1520 (W.D. Mo. 1992) (vacating $2.7 million punitive damages award in commercial dispute as based on passion and prejudice); *Medical Mutual Life Insurance Soc.* v. *R. Dixon Evander & Associates*, 92 Md. App. 551, 609 A.2d 353 (Md. App. 1992) (vacating and remanding $7 million punitive damage award in commercial case for explanation in light of *Haslip*); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 930 F.2d 1342 (vacating and remanding $8 million punitive damage award for analysis required under *Haslip*).

Those cases attest eloquently to the failure of jury instructions on punitive damages to offer any real guidance to juries. They reflect juries that have been "left largely to themselves" with the temptation to "run wild."

As the Fourth Circuit observed in *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991):

> When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process, our sensibilities about that process are offended. . . .
>
> If Congress were to enact a statute that provides that "anyone who wantonly or recklessly breaches an existing duty of law becomes subject to a penalty in an amount that the factfinder wishes to enter," consensus would readily be reached to strike it down for being vague and lacking meaningful standards.

947 F.2d at 105-06.

The continuing growth of extraordinary punitive damage awards stems in no small part from the failure of lower Courts to heed the fundamental message of this Court's decision in *Haslip*: that due process requires that any award of punitive damages be based on "objective criteria" and bear some relation to the amount of damage caused and the nature of the wrongful conduct to be punished. Notwithstanding that *Haslip* reaffirmed the disapproval expressed in prior cases of punitive damage schemes in which "an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive,' . . . or . . . when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience,' " 111 S. Ct. at 1045 n.10, courts continue to refuse to disturb jury awards of punitive damages absent a finding of "passion" or an abuse of discretion. For example, *Peoples Bank & Trust Co.* v. *Globe International, Inc.*, 786 F. Supp. 791, 802 (W.D. Ark. 1992),

applied a "passion and prejudice" standard and declined to reduce $850,000 punitive damage award because that award did not "shock the conscience of the court." In *K-Mart Corp.* v. *Pearson*, 818 S.W.2d 410, 416-17 (Tex. App. 1991), after the jury was instructed to award punitive damages "in your discretion" and that "you may consider [defendant's] net worth in determining what amount, if any would constitute a penalty," the court deferred to the jury's finding and noted that it "cannot say that the jury's award of $2,200,000 in exemplary damages is excessive."

In *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085, 1095-96 (5th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1778 (1992), after holding without any analysis that the award of punitive damages was appropriate under a factor analysis set by the Texas Supreme Court, the Fifth Circuit further noted that the defendant had not "shown us that the total of the punitive damage award was the product of passion rather than reason." The Ninth Circuit in *Morgan* v. *Woessner*, 975 F.2d 629, 640 (9th Cir. 1992), reviewed a punitive damage award under 42 U.S.C. § 1983 (1992) under an abuse of discretion standard under *Browning-Ferris* and held that "we hardly think it clear that the Supreme Court intended *Haslip* to alter federal courts' review of punitive damages [under Section 1983]." *See also Commonwealth Lloyd's Insurance Co.* v. *Thomas*, 825 S.W.2d at 148-49 (holding that jury instruction satisfied due process requirements under *Haslip* and refusing to disturb jury award because "there was some evidence to support the jury's finding"); *Jordan* v. *Clayton Brokerage Co.*, 975 F.2d at 542 (under Missouri law, punitive damage award may be reduced or vacated only if it constitutes an

abuse of discretion and rejecting due process challenge to that standard because first raised on remand).

Juries further receive little meaningful guidance as to the amount of an award of punitive damages, and, unlike in *Haslip*, courts often defer to the discretion of the jury in setting those amounts. As noted above, *K-Mart Corp.* v. *Pearson*, 818 S.W.2d at 416-17, deferred to an award by a jury that had been instructed to award punitive damages "in your discretion." *Viking Insurance Co.* v. *Jester*, 836 S.W.2d 371, 379 (Ark. 1992), affirmed $250,000 in punitive damages awarded by a jury in an insurance case for damage to an automobile in which the plaintiff had received $1,000 in compensatory damages without any discussion of the appropriateness of that amount other than in comparison with the financial condition of the defendant. That result makes hollow the court's pronouncement in *Jester* that "we have always carefully scrutinized punitive damage awards." 836 S.W.2d at 379. In *Maintenance Equipment Co.* v. *Godley Builders*, 420 S.E.2d 199, 203-05 (N.C. App. 1992), after holding that "the amount of punitive damages . . . 'rests in the sound discretion of the jury although the amount assessed is not to be excessively disproportionate, . . .' " the North Carolina Court of Appeals made no separate analysis of the appropriate award. That court simply stated that "we conclude the trial court did not err by denying the motion for JNOV." 420 S.E.2d at 204.

Courts awarding large amounts of punitive damages further justify such awards based only upon the financial resources of the defendants, which raises concerns about prejudice against large corporations. In *Burke* v. *Deere & Co.*, 780 F. Supp. at 1237, the Court remitted a $50 million punitive damage award (in addition to compen-

satory damages of $600,000) to $28 million, with the observation that "to be effective . . . the exemplary damages awarded must be relatively large." *Accord FDIC* v. *W.R. Grace & Co.*, 691 F. Supp. 87 (N.D. Ill. 1988), *aff'd in part rev'd in part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (court must look at financial status of defendant in order to ensure that punitive damages punish the defendant).[8]

Those holdings acquiesce in, if not encourage, unlimited jury power to take assets away from corporate defendants and ignore the warning issued by Justice Brennan in his concurring opinion in *Browning-Ferris* as to the fundamental unfairness of punishing a party based on its wealth. In contrast, other courts, heeding Justice Brennan's concerns, have held that the net worth of a defendant should only serve as a mitigating factor with respect to an award of punitive damages. In *Fraidin* v. *Weitzman*, 93 Md. App. 168, 211-16, 611 A.2d 1046, 1067-69 (Md. App. 1992), the Maryland Special Court of Appeals held that the net worth of a defendant was a "limiting factor" on punitive damage awards. *Vasbinder* v. *Scott*, 976 F.2d 118, 121-22 (2d Cir. 1992), took the financial condition of the defendants into consideration in mitigating punitive damage awards so that those awards would not "result in the financial ruin of the defendant . . . [or] constitute a disproportionately large proportion of the defendant's net worth." 976 F.2d at 121.

Moreover, some courts have held that the net worth of a defendant should only be considered as a limiting fac-

[8] *See also Maintenance Equipment Co.* v. *Godley Builders*, 420 S.E.2d at 203-05; *K-Mart Corp.* v. *Pearson*, 818 S.W.2d at 416-17.

tor, to be considered after determination of the other factors properly weighed in setting an award, such as the nature of the wrongful conduct and the amount of damage caused by that conduct. In announcing detailed procedures to meet the due process requirements as articulated in *Haslip*, the Supreme Court of Tennessee in *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992), required that punitive damages be considered in a bifurcated hearing, with evidence of the financial condition of the defendant not to be admitted in the liability hearing. *See also Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (jury can consider net worth of defendant only after deciding that defendant has acted maliciously).[9]

The arbitrary nature of punitive damage awards makes the process of awarding punitive damages and their extent particularly suspect in commercial litigations such as the instant case. Courts have often noted the commercial setting of case as a reason for vacating or reducing punitive damages awards. In *Medical Mutual Liability Insurance Soc.* v. *R. Dixon Evander & Associates*, 92 Md. App. at 551, 609 A.2d at 369, the Court in remanding a $7 million punitive damage award observed that "the commercial dispute that triggered the [award]

[9] At least one court has observed that the use of a defendant's net worth as a mitigating factor on punitive damages may be constitutionally mandated under *Haslip*. *Mattison* v. *Dallas Carrier Corp.* held that the South Carolina law on punitive damages prior to *Haslip* was unconstitutional and noted that, under that law, "While . . . financial ability of the defendant is a relevant factor, . . . it is apparently not limiting." 947 F.2d at 100. The Fourth Circuit ordered a retrial under South Carolina procedures announced after *Haslip*, which include an instruction on "*Limitation based on ability to pay*." 947 F.2d at 110 (emphasis in the original.

was not 'very high on the scale of reprehensibility.' " In such settings, reckless and even malicious conduct does not endanger human lives or threaten physical injury, and the amount of damages actually caused or likely to be cause is readily quantifiable.[10] As noted in *Alexander & Alexander, Inc.* v. *R. Dixon Evander & Associates*, 88 Md. App. at 721, 596 A.2d at 711 in vacating a $12.5 million punitive damage award in a dispute over an exclusive insurance brokerage relationship:

> [the defendant] did not endanger the public health or safety; its conduct was not life-threatening to anyone. We accept . . . that it should be punished for, and others deterred from, engaging in [inappropriate] conduct. But nothing approaching $12.5 million is necessary to achieve either goal.

88 Md. App. at 721, 596 A.2d at 711. *Jacobs Manufacturing Co.* v. *Sam Brown Co.*, 792 F. Supp. at 1537, similarly vacated a $2.7 million award of punitive damages on a counterclaim arising out of the termination of a business relationship noting that "each year the defendant, through its highly sophisticated president with access to legal counsel, agreed in writing to the terms that would govern the business relationship with plaintiff." Under those circumstances, the Court held that the defendant had no claim for punitive damages based on

[10] The West Virginia Supreme Court below, without citing any evidence, speculated that "the type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims." 419 S.E.2d at 889 (emphasis in the original). The Court below referred to no evidence of the amount of damages that petitioner actually did cause other than the $19,000 in actual damages awarded.

the termination of that relationship in accordance with the terms of those agreements.[11]

The negative effect of an arbitrary award of punitive damages upon commercial relations will far outweigh any benefit of such an award. By their very nature, being awarded on top of all damages necessary to make a plaintiff whole, punitive damages represent an economic windfall to the party seeking them. As the Seventh Circuit noted in affirming the vacation of a punitive damage award in *AMPAT/Midwest, Inc.* v. *Illinois Tool Works*, 896 F.2d 1035, 1044 (7th Cir. 1990), "AMPAT received a generous award of compensatory damages; all that has been taken away is a windfall." In *Mosser* v. *Fruehauf Corp.*, 940 F.2d at 88, the Fourth Circuit, similarly affirmed the denial of punitive damages based on negligent conduct and noted that " 'to the best of the legal system's ability, the plaintiff has been compensated for her loss; punitive damages would serve no purpose.' " *Accord Vasbinder* v. *Scott*, 976 F.2d at 121 ("because neither compensation nor enrichment is a valid purpose of punitive damages, an award should not be so large as to constitute 'a windfall to the individual litigant' "). Similarly, under Michigan law, punitive damages are only available to plaintiffs who have not been made whole by compensatory damages. *Thompson* v. *Paasche*, 950 F.2d 306, 314 (6th Cir. 1991) (affirming decisions of

[11] Other lopsided punitive damage awards arising out of commercial dealings include *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 4 (1987) ($3 billion), *Lightning Lube, Inc.* v. *Wilco Corp.*, 802 F. Supp. 1180 (jury awarded $50 million in punitive damages), *Tunis Brothers Co.* v. *Ford Motor Co.*, 952 F.2d 715 (jury award of $4 million in punitive damages), and the $533 million punitive damage award against the accounting firm of Coopers & Lybrand reported in The N.Y. Times, Feb. 18, 1992, at D5.

district court striking punitive damage award because actual damage award had made plaintiff whole).

In contrast, the unfettered awarding of punitive damages removes the predictability and ability to assess risk that stand as the foundation of any commercial system. Awards like those discussed herein increase the cost of doing business. Whether by being passed along in the form of marked-up prices or through diminution in competition resulting from the elimination of business entities that cannot afford the added costs of doing business, that cost is ultimately born by consumers. As Judge Friendly predicted in *Roginsky* v. *Richardson-Merrell, Inc.*:

> [T]he apparent impracticability of imposing an effective ceiling on punitive awards . . . may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts. If liability policies can protect against this risk, as several courts have held, the cost of providing this probably needless deterrence . . . is passed on to the consuming public; if they cannot, as is held by other courts and recommended by most commentators, a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.

378 F.2d at 841 (footnote omitted).

A striking example of that very result was the cataclysmic $10 billion award (including $3 billion in punitive damages) in *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 4 (1987). That award was settled by a transfer of substantial assets from Texaco Inc. to Pennzoil Co. The ultimate burden of that award thus fell on the shareholders of Texaco, who had nothing to do with the allegedly wrongful conduct supposedly being punished in that case, not the management or the parties responsible for the allegedly wrongful conduct. That award therefore did not even serve the purpose of punishment or retribution, but arbitrarily awarded one oil corporation (Pennzoil) a windfall out of the pockets of the innocent shareholders of another (Texaco).

POINT III

THIS COURT SHOULD SET FORTH THE MINIMUM REQUIREMENTS OF DUE PROCESS IN CONNECTION WITH THE AWARDING OF PUNITIVE DAMAGES

In light of the failure of the courts of West Virginia and other states to follow *Haslip* as noted above, this Court should make clear what due process requires in connection with punitive damage claims. Although this Court noted in *Haslip* that "we need not, and indeed we cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," 111 S. Ct. at 1043, this Court should at least give a general indication of the parameters within which punitive damage awards are constitutionally acceptable. *Haslip* mandated that punitive damage awards be "not grossly out of proportion to the severity of the effects and have some understandable to compensatory damages." 111 S. Ct. at 1045. What is

lacking below and in the other decisions that do not reflect the due process considerations of *Haslip* is a firm understanding as to what constitutes an award "grossly" out of disproportionate to the conduct to be punished or an "understandable" relationship to compensatory damages.[12]

Although a punitive award that eliminates the profitability of wrongful conduct may also pass constitutional muster, such an award, however, would present difficulties in litigation not involving all of the parties injured by the wrong conduct. Absent such a limitation, a court considering an award of punitive damages in favor of one plaintiff arising out of conduct that may have injured other parties would face the impossible dilemma of exposing the defendant to punitive liability many times the profitability of the wrongful conduct and permitting one plaintiff to obtain windfall punitive damages as opposed to other parties similarly situated, as was noted by Judge Friendly in *Roginski*, 347 F.2d at 838-42.

[12] Although this Court in *Haslip* rejected the argument that the punitive damage award was "much in excess in of the fine that could be imposed for insurance fraud" because of the possibility of imprisonment for insurance fraud as well, 111 S. Ct. at 1046, the potential for imprisonment should not preclude a comparison between the amount of punitive damages and the criminal damages. The amount of potential imprisonment for a particular offense varies with the severity of that offense, just as with the level of a fine. Although not offering a precise mathematical analogy, the potential amount of imprisonment for conduct in question does not preclude the use of applicable criminal penalties as a general measure of the severity of the offense and thus may serve as a reference for the appropriate amount of punitive damages.

In addition, due process prevents the use of punitive damages as a means of destroying a defendant. *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d at 100, 110. Many courts, in awarding punitive damages, have held as a matter of common law that punitive damages may not be used to ruin a defendant. *Fraidin* v. *Weitzman*, 93 Md. App. at 211-16, 611 A.2d at 1068-70; *Vasbinder* v. *Scott*, 976 F.2d at 121; *Herman* v. *Sunshine Chemical Corp.*, 608 A.2d 978 (N.J. App. 1992) (remanding punitive damage award to jury for consideration as to defendant's financial condition to pay). As a result, the constitutional limit of an award of punitive damages should also provide that any award of punitive damages be within the ability of the defendant to pay.

Two other due process requirements would fairly remedy the errors below. First, as proposed by Justice O'Connor in her dissenting opinion in *Haslip*, punitive damages should be awarded from a bifurcated proceeding after the primary liability of the defendant has been established. *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. at 1064. Such a bifurcation would ensure that a jury could not be prejudiced by the wealth of a defendant in assessing liability or by the introduction of "bad acts" otherwise irrelevant to a showing of liability to show the malicious level of conduct necessary for the imposition of punitive damages. Moreover, in punitive damage schemes under which the jury is required (whether as a matter of state or constitutional law) to decide based upon a standard of proof higher than a preponderance of the evidence, potential jury confusion will be omitted.[13]

[13] This Court in *Haslip*, while noting its approval of the requirement that punitive damages only be awarded based upon clear and convincing evidence as a matter of policy held that due

Courts have often bifurcated punitive damage proceedings on their own accord. *See Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363, 373-74 (2d Cir. 1988) ("since it often would be prejudicial to a defendant to attempt to litigate its financial condition during the trial on issues of liability and compensatory damages, the preferred method of accommodating the various interests is to delay trial as to the amount of punitive damages until the usual issues of liability and compensatory damages have been tried, along with the matter of whether the defendant's conduct warrants any award of punitive damages at all"). Moreover, *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d at 901, in response to *Haslip*, held that punitive damage proceedings were required to be bifurcated under Tennessee law in order to satisfy the due process requirements of *Haslip*.

Finally, this Court should expressly hold that due process protects a party against the use of that party's net worth to prejudice a jury. The opinion and the result below reflect a bias against petitioner and against institutional corporations that establishes beyond doubt that petitioner did not receive a fair hearing. Such bias is the antithesis of due process. To eliminate such bias, and the potential for juries to "run wild" with punitive damage awards against corporate defendants, this Court should reiterate that the net worth of a defendant cannot be used as the sole factor in setting an award of punitive dam-

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process did not require such a standard of proof with respect to the Alabama punitive damages law at bar in that case in light of the detailed judicial scrutiny of a jury award at the trial and appellate levels. 111 S. Ct. at 1046 n.11. That holding, of course, does not preclude the possibility that a higher standard of evidence might be constitutionally required under systems in which courts are not required to offer the same degree of judicial scrutiny.

ages, but that awards must have some rational connection with the nature and severity of the conduct being punished and the harm caused by that conduct.

CONCLUSION

For the reasons set forth above, the opinion of the Supreme Court of Appeals of West Virginia should be reversed.

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